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90-993

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

In The
Supreme Court of the United States
October Term, 1990

CSX TRANSPORTATION, INC.,
Petitioner,

v.

STEPHEN RASTALL and TIMOTHY GOWDEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

SUPPLEMENTAL APPENDIX TO PETITION OF CSX TRANSPORTATION, INC. FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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December 20, 1990

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

STEPHEN RASTALL R.R. 1 Camlachie, Ontario NON1E0; and TIMOTHY GOWDEY 360 East Street, North Sarnia, Ontario N7T6YE On behalf of themselves and all other persons similarly situated Plaintiffs, v. CSX CORPORATION 1 James Centre Richmond, Virginia 23219; and CSX TRANSPORTATION, INC. 500 Water Street Jacksonville, Florida 32202 Serve: Woodruff M. Price, Registered Agent 1331 Pennsylvania Avenue, N.W. Suite 560 Washington, D.C. 20004 Defendants.	Civil Action No. ___

COMPLAINT FOR BREACH OF CONTRACT
NATURE OF THE ACTION

1. This is a civil class action in which Plaintiffs seek injunctive relief and damages for breach of contract resulting from the failure of Defendants to pay Plaintiffs and all others similarly situated the amount to which they are entitled under their employment contracts with Defendants.

2. Plaintiffs reside and work in Ontario, Canada for CSX Transportation, Inc. which is a wholly owned subsidiary of CSX Corporation, a Virginia Corporation, and which operates a railroad system consisting of approximately 22,000 miles of track in the United States and approximately 100 miles of track in Canada.

3. The terms and conditions of Plaintiffs' employment are governed by a collective bargaining agreement which was negotiated and executed in the United States and which applies to employees of CSX Transportation and its predecessors in interest (hereinafter referred to collectively as "CSXT") in Plaintiffs' craft wherever they reside and work. All CSXT's collective bargaining agreements covering railroad employees, including those covering Plaintiffs, require CSXT to pay wages, pensions and other benefits in "dollars."

4. CSXT has paid and continues to pay all its railroad employees who reside and work in the United States in United States dollars. CSXT, however, has paid and continues to pay all its employees who reside and work in Canada in Canadian dollars. Because a Canadian dollar is and has been for several years worth substantially less than a United States dollar, CSXT's practice has greatly injured and discriminated against Plaintiffs and all other CSXT railroad employees residing and

working in Canada by compensating them less for the same work than their counterparts who reside and work in the United States. Plaintiffs contend that the collective bargaining agreements covering Canadian employees require payment to them and all other Canadian employees of wages and benefits in United States dollars or the equivalent value and that CSXT's practice of paying them in Canadian dollars is a breach of contract.

PARTIES AND JURISDICTION

5. Plaintiff Stephen Rastall is a Canadian citizen who resides at R.R. 1, Camlachie, Ontario NON1E0. He is employed by CSX as a carman and performs his duties in Canada. He has been employed by CSX continuously since 1978.

6. Plaintiff Timothy Gowdey is a Canadian citizen who resides at 360 East Street, North, Sarnia, Ontario N7T6YE. He is employed by CSX as a carman and performs his duties in Canada. He has been employed by CSX continuously since 1978.

7. Defendant CSX Corporation is a Virginia corporation with its principal place of business at One James Centre, Richmond, Virginia 23219. Defendant CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation, which operates a 22,000 mile railroad system serving 20 states and the District of Columbia in the United States and the Province of Ontario, Canada. CSX Transportation employs more than 40,000 persons, approximately 200 of whom reside and work in Canada. CSX Corporation and CSX Transportation do business in the District of Columbia. Among other activities, CSX Transportation owns railroad tracks and operates trains in the District of Columbia.

8. Jurisdiction of this Court is founded on D.C. Code (1967 Edition, Supplement II) § 11-921.

9. Personal jurisdiction over the defendants is conferred upon this court by D.C. Code Ann. (1961 Edition, Supplement IV) § 13-334(a).

CLASS ACTION ALLEGATIONS

10. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated, pursuant to SCR - Civil 23(a) and (b)(1), (2) and (3). The class which Plaintiffs represent is composed of all past, present and future employees of CSXT who have resided and worked for CSXT in Canada.

11. The class is comprised of approximately 200 persons presently residing in Canada and employed by CSXT in Canada and hundreds of other Canadian residents either employed by CSXT in the past or who will be employed by CSXT in the future. These persons are so numerous that the joinder of all is impracticable.

12. There are common questions of law and fact affecting the members of this class. The principal common question is whether the collective bargaining agreements of the class members with CSXT entitle them to receive wages valued in United States dollars. Upon information and belief, the provisions of the collective bargain agreements covering all members of the class that are pertinent to this question are substantially identical. This common question predominates over any questions affecting only individual members of this class.

13. Plaintiffs' claims are typical of the claims of the class and Plaintiffs will fairly and adequately protect the interest of the class. The contract provisions on which Plaintiffs' rely are substantially identical to those of the other class members' collective bargaining agreements. The interests of Plaintiffs and the class are thus co-extensive. Plaintiffs have no interest antagonistic to the class members, nor will CSX Corporation and CSXT have any defense against this action unique to Plaintiffs.

14. The prosecution of separate actions by the class members would create a risk of varying adjudications which would establish incompatible standards of conduct for the Defendant.

15. Defendants have acted and have refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

16. A class action is superior to any other available method for the fair and efficient adjudication of this controversy.

BACKGROUND OF THE ACTION

17. The collective bargaining agreement covering Plaintiffs is attached as Exhibit A (the "CBA"). It was negotiated and executed in the United States. Rule 12 of the CBA specifies rates of pay in terms of "dollars" or with the dollar symbol, "$".

18. From 1950 through 1977 the value of the Canadian dollar and the United States dollar were substantially equal. As shown by Exhibit B, the Canadian dollar during this period was never more than 8 percent higher or lower in value than

the United States dollar. Beginning in 1978 the value of the Canadian dollar relative to the United States dollar began to decline dramatically. In 1978 a Canadian dollar was worth 88 cents in United States currency; in 1983 it was worth 81 cents; in 1984 it was worth 77 cents; and in 1986 it was worth 72 cents, or 28 percent lower in value than the United States dollar.

19. Pursuant to the grievance procedures set forth in Rule 32 of the CBA, Plaintiffs and others filed a claim with Mechanical Superintendent R.W. Meseke, a CSXT official, for payment of their wages in United States dollars or the equivalent thereof. R.W. Meseke denied Plaintiffs' claims by letter dated February 6, 1987.

20. Plaintiffs filed an appeal of R.W. Meseke's action on March 25, 1987 to J.T. Williams, Director of Labor Relations of CSXT. Said appeal is attached as Exhibit C.

21. By letter dated May 18, 1987 Mr. Williams denied Plaintiffs' appeal. Exhibit D.

22. Mr. Williams conducted a further conference regarding Plaintiffs' appeal on June 9, 1987. Following the conference Mr. Williams adhered to his earlier decision denying the appeal. His report of the conference stated as follows:

> Both American and Canadian employees wages are derived from agreements negotiated in the U.S. with all wages and rates stated in terms of "dollars". There has never been any provision of any Agreement distinguishing between Canadian and American dollars or referencing exchange rates. This has remained

true even at times when the exchange rate favored the Canadian dollar.

Exhibit E.

23. On October 27, 1987 the Plaintiffs' attorneys met with Mark Aron, CSX Corporation's Senior Vice President, Law and Public Affairs, further to press the claims of Plaintiffs and all other Canadian employees of CSXT regarding payment in United States dollars. Following the meeting, Plaintiffs' attorneys set forth their reasons in a letter dated November 13, 1987. Exhibit F.

24. By letter dated December 30, 1987 Mr. Aron responded to Plaintiffs' attorneys, denying their claims. Exhibit G.

25. Plaintiffs have exhausted all available grievance procedures. In view of the positions asserted by J.T. Williams, CSXT's Director of Labor Relations, and Mark Aron, CSX Corporation's chief legal officer, further grievances and claims by any Canadian employee regarding payment in United States dollars would be futile.

CAUSE OF ACTION FOR BREACH OF CONTRACT

26. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

27. The collective bargaining agreements covering Plaintiffs and members of the Plaintiff class establish the level of wages, pensions and other benefits required to be paid to all CSXT employees, including Plaintiffs and members of the Plaintiff class, in terms of United States dollars. The agreements were

negotiated in the United States. Defendants and the employees' bargaining agents understood and intended that the wages, pensions and other benefits were established in terms of United States dollars. It would be unreasonable and contrary to public policy to construe the agreements in a way that would provide different and substantially less wages, pensions and benefits to Canadian employees from the wages, pensions and benefits provided to United States employees of the same employer for the same work.

28. Defendants' payment of wages to Plaintiffs and members of the plaintiff class in Canadian dollars and Defendants' refusal to pay such wages in American dollars or the equivalent value at current exchange rates constitute a continuing breach of Defendants' contractual obligations to Plaintiffs and members of the Plaintiff class.

WHEREFORE,

(a) This Court should order Defendants to pay damages to Plaintiffs and all members of the Plaintiff class equal to the difference between the value of the total dollars paid to Plaintiffs and members of the Plaintiff class in United States dollars as wages and other benefits, calculated at the exchange rates at the times of such payments, and the value of the total dollars paid to Plaintiffs and members of the Plaintiff class in Canadian dollars, calculated at the exchange rates at the times of such payments, plus interest from the times of such payments;

(b) This Court should enjoin Defendants from refusing hereafter to pay Plaintiffs and members of the Plaintiff class wages and benefits in United States dollars or the equivalent value;

(c) The Court should award costs and attorneys fees to Plaintiffs and their attorneys; and

(d) This Court should grant such other and further relief as the Court may deem just and proper.

Pursuant to SCR-Civil 38(b), Plaintiffs demand a trial by jury.

Richard A. Allen
D.C. Bar No. 160523

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN RASTALL, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	Civil Action No.
	)	88-610-GAG
	)	
CSX CORPORATION, et al.,	)	
	)	
Defendants	)	

* * * * * * * * *

AFFIDAVIT OF WARREN C. COMISKEY

WARREN C. COMISKEY, first being duly sworn, hereby deposes and states as follows:

1. I am over eighteen years of age, and competent to render testimony in legal proceedings.

2. All of the statements made herein are of my own personal knowledge, or are based upon either reliable information received by me in the ordinary and regular course of business, or upon the records kept in the offices in which I am employed and which records were accumulated and maintained in the ordinary and regular course of business.

3. I am presently employed as Director, Labor Relations for CSX Transportation, Inc. (CSXT). I have been employed in the labor relations field for CSXT or one or more of its predecessors for 15 years.

4. CSXT is a common carrier by rail, and is the successor by merger to the Chesapeake and Ohio Railway Company (C&O). The C&O in turn was the successor by merger (on June 6, 1947) to the Pere Marquette Railway (PMR).

5. PMR operated in southern Ontario and in Michigan, and employed employees in both Canada and the United States, including certain employees who operate trains whose functions required them to cross national borders routinely. After PMR merged into C&O, it remained as separate seniority territories of C&O or with separate seniority points (except as to one equipment repairman position) for collective bargaining and administrative purposes. The separate seniority territories or points (except as to one position, as stated before) for collective bargaining and administrative purposes have been maintained by CSXT. Neither CSXT nor the C&O (hereafter collectively the Railroad) have had any collective bargaining employees in Canada other than those operating within the Canadian seniority district of the former PMR (Canadian District).

6. The following crafts have historically operated within the Canadian District:

1) Transportation Communications International Union

2) Brotherhood of Locomotive Engineers

3) United Transportation Union (C&T) (Road Conductors and Trainmen)

4) United Transportation Union (E) (Firemen and Hostlers)

5) United Transportation Union (T) (Yardmen)

6) Allied Services Division/Transportation Communications International Union

7) Brotherhood of Railroad Signalmen

8) Brotherhood of Maintenance of Way Employees

9) International Association of Machinists and Aerospace Workers

10) Brotherhood Railway Carmen of the United States and Canada

11) American Train Dispatchers Association

12) American Railway and Airway Supervisors Association Division/Transportation Communications International Union

All Canadian District employees who were members of these crafts were represented by labor unions which entered into collective bargaining agreements with the Railroad. When disputes concerning the meaning or implementation of those agreements arose between those employees (and/or their unions) and the Railroad, these disputes were invariably

addressed by resort to the grievance and arbitration provisions of the Railway Labor Act, 45 U.S.C. Section 151 *et seq.* (the Act).

7. On one occasion, when Canadian District employees sought to arbitrate a grievance according to the terms of the Act, before the National Railroad Adjustment Board, the Railroad opposed the jurisdiction of the Board on the basis that the Act did not apply to Canadian employees within the Canadian District. The Board rejected that contention and ruled that it did have jurisdiction. *Order of Railroad Telegraphers*, Award No. 12667, Natl. R. Adj. Bd., 3rd Div., Docket TE-10995 (June 26, 1964). (Exhibit A hereto).

8. Other cases where Canadian District employees, their unions, and the Railroad arbitrated grievances according to the terms of the Act are:

a) *System Federation No. 4 (Carmen)*, Special Bd. of Adj. No. 570, Award No. 452, Case No. 514 (decided Chicago, Illinois, May 17, 1978) (Exhibit B hereto). In this case, the Carmen's union claimed that the employee was furloughed at Paquette, Ontario, without notice as required under the same collective bargaining agreement which has given rise to the above-captioned dispute. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

b) *United Transportation Union*, Publ. L. Bd. No. 347, Award No. 25 (decided Detroit, Michigan, February 5, 1970) (Exhibit C hereto). This case involved a derailment at Walkerville, Ontario, resulting in the suspension of a brakeman for fifteen

days. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

c) *United Transporation Union*, Publ. L. Bd. No. 347, Award No. 87 (decided Detroit, Michigan, May 16, 1972) (Exhibit D hereto). This involved a brakeman's claim of a right to be called to work at St. Thomas, Ontario. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

d) *United Transportation Union (E)*, Publ. L. Bd. No. 884, Award No. 5 (decided Detroit, Michigan, February 17, 1974) (Exhibit E hereto). Although this engineer and fireman's claim involved an international portion of the run, the occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

e) *United Transportation Union (E)*, Publ. L. Bd. No. 884, Award No. 6 (decided Detroit, Michigan, February 7, 1974) (Exhibit F hereto). Although this engineer and fireman's claim involved an international run, the part of the run which was the subject of the grievance was in Canada, and the crew was Canadian. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

f) *Brotherhood of Locomotive Engineers*, Publ. L. Bd. No. 1547, Award No. 153 (decided Baltimore, Maryland, June 29, 1984) (Exhibit H hereto). This case involved an employee suspension arising out of

the conduct of a Canadian employee in a Canadian rail yard. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

h) *Brotherhood of Locomotive Engineers*, Publ. L. Bd. No. 1547 Award No. , Case No. 163 (decided Baltimore, Maryland, April 20, 1987) (Exhibit I hereto). This case arose from the dispatch of a relief crew from the United States to relieve a crew in Ontario. The occurrence on which the claim was based arose exclusively in Canada and it was adjudicated under the Act's procedures.

i) *Brotherhood of Locomotive Engineers*, Publ. L. Bd. No. 1547, Award 160 (decided Baltimore, Maryland, April 30, 1986) (Exhibit J hereto). This engineers' claim resulted from delay in the United States, but the employees involved were Canadian. It was adjudicated under the Act's procedures.

j) *Brotherhood of Locomotive Engineers*, Publ. L. Bd. No. 1547, Award No. 155 (decided Baltimore, Maryland, June 29, 1984) (Exhibit K hereto). This engineers' claim resulted from delay in the United States, but the employees involved were Canadian. It was adjudicated under the Act's procedures.

k) *Brotherhood of Railway Signalmen*, Nat. R. Adj. Bd., Third Div., Award No. 21130, Docket No. SG-21059 (decided Chicago, Illinois, July 30, 1976) (Exhibit L hereto). This dispute involved signalmen who were exclusively employed within Canada. It was adjudicated under the Act's procedures.

9. In addition to these cases, which clearly demonstrate a pattern and practice by the Railroad, its employees within the Canadian District, the National Railroad Adjustment Board, and Public Law Boards consistently viewing the Act as the law governing the resolution of grievances, it is similarly viewed by numerous present employees within the Canadian District as to the very question here in issue (whether Canadian employees of the Railroad are to be paid in American dollars). I have knowledge that responses have been made to 326 claims filed by 69 employees, including conductors, clerks, firemen, engineers, carmen, and train dispatchers, all brought in accordance with the provisions of the Act, all relating to this issue.

WARREN C. COMISKEY

STATE OF FLORIDA)
) To Wit:
COUNTY OF DUVAL)

I HEREBY CERTIFY that on this _____ day of _____, 1988, before me, the subscriber, a Notary Public in and for the State and County aforesaid personally appeared WARREN C. COMISKEY who made oath in due form of law that the matters and facts set forth in the aforegoing Affidavit are true and correct to the best of his knowledge, information and belief.

AS WITNESS my hand and Notarial Seal.

_____
NOTARY PUBLIC

Award No. 12667
Docket No. TE-10995

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Pere Marquette District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway (Pere Marquette District) that:

1. Carrier violated the agreement between the parties when it required or permitted employes not covered by the agreement to handle work permit orders (Form CC-4) at Leamington, Ontario on December 9, 1957, at Kingsville, Ontario on December 9, 1957, and at Harrow, Ontario on December 10, 1957.

2. Carrier shall be required to compensate the Agent-Operator at each station in the amount of a minimum call payment:

B. N. Brad, Agent-Operator, Leamington, on December 9, 1957,

G. W. Hall, Agent-Operator, Kingsville, on December 9, 1957,

H. V. Meek, Agent-Operator, Harrow, on December 10, 1957.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

At Leamington, Ontario there is one position covered by the Agreement, that of Agent-Operator with assigned hours of 9:00 A.M. to 6:00 P.M. (one hour meal period). At the time cause for this claim arose B. N. Brad was the regularly assigned incumbent of the position. At 6:59 P.M. on December 9, 1957 the conductor of train Extra 5734 received and copied direct from the train dispatcher the following work order:

"WORK PERMIT CARD FORM CC-4

December 9, 1957

TO C&E Eng 5731 at Leamington

You may work between Stop 3 west and Leamington and Stop 3 east end Wheatley until 7:55 P.M.

(signed) HBM."

The conductor then repeated the order to the train dispatcher and delivered a copy to the engineer of his train.

At Kingsville, Ontario there is one position covered by the Agreement, that of Agent-Operator with assigned hours of 8:00 A.M. to 5:00 P.M. (one hour meal period). At the time cause for this claim arose G. W. Hall was the regularly assigned incumbent of this position. At 6:01 P.M. on December 9, 1957 the conductor of train Extra 5734 received and copied the following work order direct from the train dispatcher:

"WORK PERMIT CARD FORM CC-4
December 9, 1957, 6:01 P.M.

To C&E Eng 5734 at Kingsville

You may work between S. Signal M-31-3 and S. Signal N-29 until 6:15 P.M.

(signed) HBM."

The conductor then repeated the order to the train dispatcher and delivered a copy to the engineer of his train.

Again at 6:23 P.M. the conductor of Extra 5734 at Kingsville received and copied the following order direct from the train dispatcher:

"WORK PERMIT CARD FORM CC-4

To C&E Eng 5734 at Kingsville

You may work between S. Signal M-29 and S. Signal N-31.3 until 7:15 P.M.

(signed) HBM."

The conductor then repeated the order to the train dispatcher and delivered to the engineer of his train.

At Harrow, Ontario there is one position covered by the agreement, that of Agent-Operator with assigned hours of 8:00 A.M. to 5:00 P.M. (one hour meal period). At the time cause for this claim arose H. V. Meek was the regularly assigned incumbent of the position. At 5:22 P.M. on December 10, 1957 the conductor of train Extra 5731 received and copied the following order direct from the train dispatcher:

"WORK PERMIT CARD FORM CC-4
December 10, 1957, 5:22 P.M.

To C&E Eng 5731 at Harrow

You may work between SS EE Harrow and SS Mileage 19 until 6:00 P.M.

(signed) HBM."

The conductor then repeated the order in the train dispatcher and delivered a copy to the engineer of his train.

The violations set forth above all took place outside the regular hours of the agent-operators. The agent-operator at each station was available for this work.

Claims were filed and handled in the usual manner up to and including the highest designated officer of the Carrier and have been declined. The claims were handled in three separate proceedings on the property. Correspondence covering the handling of the claim at Leamington which is typical of the others is attached hereto as ORT Exhibits Nos. 1 through 9.

POSITION OF EMPLOYES: The work in connection with the handling of work orders whether by Form 19 or 31 or by Work Permit Card is work covered by the scope of the Telegraphers' Agreement and must be assigned to employes covered by that Agreement. All the work at a one-man station belongs to the agent-operator assigned to that station.

There is no dispute between the parties concerning what actually happened. The conductors, on the dates specified, received, copied and delivered the work permit cards. Carrier wishes to classify it as mere conversation.

Employes rely primarily on the Scope Rule of the Agreement, though other rules are pertinent and applicable and will be referred to later on in this submission. Rule 1, Scope, reads as follows:

"(a) These rules shall govern the hours of service, working conditions and compensation of the following classes of employes:

Agents

Agent-Operators (Agent-Telegraphers and Agent-Telephoners)

Ticket Agents (as listed in wage scale)

Agents (small non-telegraph or non-telephone)

Chief Operators

Operator-Clerks (telegrapher-clerks and telephoner-clerks)

Operator-Cashiers

Operator-Levermen

Operator-Bridgetenders

Operators (telegraphers and telephoners but not including telephone switchboard operators)

Levermen

Drawbridge Tenders

Block Operators

Tower and Train Directors

Staff men

Any combination of two or more of the above classifications

Occupants of any other positions listed in wage schedule.

(b) As used in this agreement, the word "employe" shall be understood to include all employes of the classifications mentioned in paragraph (a) of this rule unless specific classifications are designated; and the word 'station' refers to the location at which employes perform service."

The above Scope Rule is typical of scope rules of this Organization and covers all the work accruing to the classes set forth therein. The work of transmitting and receiving messages, orders and reports of record is firmly attached to the class and craft of Telegraphers. This holds true regardless of the method of communication -- telegraph, telephone, teletype, etc. It has been held by your Board on numerous occasions that the work covered by an agreement belongs to the employes in whose behalf the agreement was negotiated and that the transfer or assignment of that work to others, not covered by the agreement, is a violation which entitles the covered employes to reparation because of the breach of contract. This was aptly expressed in Award 5172 wherein it was said:

"AWARD 5172

> It is a fundamental rule that work of a class covered by an agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the agreement is violative of the agreement. Under the rules, such work must be given to available employes within the agreement, even though overtime results, before it can be assigned to one outside the agreement, Awards 3955, 2706."

It has further been held by your Board that all the work of a one-man station belongs to the agent at that station. See Awards 4392, 5993, 6975, 7590.

There can be no doubt that work covered by the Agreement performed at Leamington, Kingsville and Harrow should be assigned to and performed by the agent-operators no matter whether inside or outside of their regular hours. This Carrier recognizes this fact as it attempts to place the work performed in a category exempted from coverage by a memorandum of agreement. The fact that the Carrier cites the memorandum of agreement to support its contention that the work is specifically excepted in that memorandum, is a recognition that the work is covered by the Scope Rule, otherwise no exception is necessary. The work of handling the work permit cards, here involved, is covered by the Scope Rule; therefore, if no exception has been made by agreement between the parties, the claim must be sustained. The memorandum of agreement which Carrier asserts excepts the work here involved appears in the printed agreement at page 48 captioned "Addendum 1." It reads as follows:

"ADDENDUM 1

MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING entered into at Detroit, Michigan, April 29, 1943, between the management of the Pere Marquette Railway Company and the Committees of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen and the Order of Railroad Telegraphers, represented by the signatories hereto:

1. It is agreed that, effective May 15, 1943, train and engine service employes will not, except in case of emergency, be required or permitted to copy, or train dispatchers or operators be required or permitted to telephone direct to train and engine service employes, train orders (Forms 19 and 31), clearances (Form A), or written messages, nor to block or report trains.

2. It is further understood and agreed that direct telephone conversation between train dispatcher or operator and train and engine service employes about work, reporting train or engine clear of main track, permission to occupy main track, or permission to cross from one main track to another, will not be construed as a violation of this agreement.

3. For the purpose of applying this understanding, emergency is defined as follows:

Severe weather disturbances; track conditions or obstructions; failure of fixed signals; engine or equipment failures, which interfere with the normal operation of

trains; casualties; accidents; or any unforeseen situations where life or property may be in jeopardy requiring immediate attention, which could not have been anticipated when train was at previous telegraph office.

FOR THE MANAGEMENT OF THE PERE MARQUETTE RAILWAY COMPANY:

/s/ M. M. Cronk
General Manager

FOR THE EMPLOYEES:

Brotherhood of Locomotive Engineers:
/s/ J. J. Hendrick
Authorized Representative

Brotherhood of Locomotive Firemen and Enginemen:
/s/ B. C. Johnson

Order of Railway Conductors:
/s/ J. J. Hendrick
Vice President

Order of Railroad Telegraphers:
/s/ H. C. Kearby
Vice President."

Before discussing the application of the above memorandum, we wish to point out that there was no emergency existing or claimed on the dates or at the locations involved in the instant dispute.

Section 1 of the Memorandum deals with train orders and certainly reserves to telegraphers the exclusive right to handle train orders. Rule 25, covering stations where operators are employed, confirms this. It is firmly established that, if the work permit cards are considered as train orders, the agreement was violated. Prior to the time CTC (Centralized Traffic Control) operation was inaugurated on this district, the control of train operation was by time table and train orders. When CTC became the primary agency of control, train orders were subordinated. Some so-called "slow orders" restricting speeds below normal limits or calling attention to unusual conditions are issued from time to time on regular train order forms. The operation and movement of trains proceeding

directly from one end of the operating district to the other with only service stops can be, and is, controlled by "signaled indication." The train dispatcher changes the positions of the switches and signals in the district by the manipulation of levers on the control board located in his office. However, some uses of the main tracks must be governed or controlled by other means. Here we are concerned with a work train or work extra. Prior to CTC, when it was necessary to authorize a work extra, a type "H" train order was issued addressed to the engine which was to perform as the work extra and addressed to eastward train at some station west of the work location and to westward trains at some station east of the work location. It was necessary to give copies to the through trains to prevent them from invading the territory allotted to the work extra. A fundamental example of a type "H" order reads as follows:

"ORDER No. 100

December 9, 1957

C&E Eng. 1

Eng. 1 work extra between A and B from 8:01 A.M. until 4:01 P.M.

(signed) ABC."

This can be supplemented by adding: "protecting against second class and extra trains" or "not protecting against extra trains." There are a number of supplements which take care of the particular situation. With the advent of CTC where the train dispatcher or train controller can hold the through trains outside of the work territory by displaying a red signal at each

end of this territory it is not necessary to address copies of the work order to the through trains. The train controller issues the work order only to the train which is to perform the work and sets the governing signals at STOP, placing tags or markers on the levers controlling the governing signals to prevent inadvertent operation of these levers. Instead of issuing a work order to cover the entire time the work train is to work, he issues a work order permitting the work extra to work until the next through train is expected, then the work extra must clear the main track allowing the through train or trains to pass and receive another work order covering the next period of time before another through train is due. Insofar as the work train is concerned it receives an order permitting it to work between specified locations during a specified period of time. The so-called Work Permit Card is nothing more than the type "H" train order adapted for use in CTC territory. If not technically a train order it certainly is an order used in lieu of a train order. For the purpose of applying the rules of the agreement, it is a train order. There are numerous awards of your Board upholding the right of telegraphers to handle train orders. In Award 5087 your Board said:

> "This division has repeatedly held that the handling of train orders within the contemplation of the ordinary train order rule such as we have here, means that the receiving copying and delivering of train orders is reserved to telegraphers."

Awards 5086, 5992, 6321, 6322 and many others also deal with the handling of train orders.

Carrier contends, of course, that the Work Permit Card is not a train order. It is forced to take this position in order to have any reason whatsoever for denying the claim.

Employes have shown above that for all practical purposes the Permit Card Form CC-4 is a train order. Carrier cannot, and does not, deny that the train service employe receives and makes copies of it and delivers a copy to the engineer; therefore, it is established that it is a communication of record. Carrier cannot deny that it directly affects -- in fact, controls -- the movement of trains. It is, therefore, established that we are here concerned with a communication of record directly controlling and affecting the movement of trains.

Carrier attempts to connect the occurrences with Section 2 of the Addendum No. 1. This section quite clearly covers "telephone conversation." This term as used in agreements or interpretations certainly does not include recorded orders, messages or other instructions. In another dispute between the parties on the Chesapeake District of this Carrier now before your Board under Docket TE-10339, Carrier makes an all-out attempt to prove that the conductor in that case did not copy the work permit contending that the copying or non-copying of the work permit is the deciding point. Here, we have the Carrier faced with a situation where it cannot deny that the work permit was copied, taking the position that its still just "conversation." Further, in Section 2 of the Addendum, the subject matter of the excepted conversations does not apply to the receiving, copying and delivering of work permit orders. It does mention "work," but the work there referred to is the work to be performed at a station such as switching or the picking up and setting out of cars; it mentions the reporting clear of main track, not directly involved here; it mentions permission to occupy main track, which refers to again using the main track after having completed work on auxiliary tracks; it mentions permission to cross from one main track to another, not directly involved here. Truly, there is nothing in Section 2 of the Addendum which has any application to the circumstances here involved. Section 2 contains all

the exceptions when no emergency exists; therefore, we have developed and established the following:

1. The work here involved is covered by the scope of the agreement.

2. It is not excepted in any supplementary agreement or understanding.

It naturally follows that the Agreement was violated which calls for sustaining award.

Carrier also injects its unilaterally conceived operating rules into the dispute, contending that the entire performance was in compliance with the operating rules, apparently with the conclusion that if it does not violate the operating rules it does not violate the Agreement rules. Consideration of operating rules in a dispute of this nature can sometimes be of value in determining the method of operation and the desire and purpose of the Carrier as to the function of employes in performing work. However, in considering operating rules, they must be properly evaluated and it must always be remembered that such rules are a product of the Carrier and can be changed at will by the Carrier. At any point where the operating rules of the Carrier conflict with the rules of the collective bargaining agreement, the operating rules must yield. If this is not so, then all collective bargaining as required by the Railway Labor Act is a farce. A carrier could on the one day enter into an agreement with its employes and on the next nullify all that it had agreed to by amending or changing its operating rules. Your Board has ruled on this subject several times. In Award 6678, it was said:

"Conceding therefore that the Carrier was in compliance with its operating rules, the fact remains

that there is a conflict with the operating rules and the agreement with the employes, the operating rules must yield. See Award 5871."

Award 7770 also upholds the same principle.

Carrier, realizing the weakness of its position, complains that it is being unfairly treated because no claims were filed in the past when it violated the Agreement in the same manner. It contends that because it has violated the Agreement without detection in the past it now has the right to continue the violations without protest or claim on the part of the Employes. In other words, it invokes the doctrine of "past practice." There was been a tendency in some awards of your Board to render a decision on purely local practice which we believe is contrary to purpose and intent of the Railway Labor Act in establishing class and craft representation on the railroads of this country. Apparently, a very important consideration was overlooked in such awards. That is, all tribunals charged with deciding disputes of this nature have held that communications work -- the work in connection with transmission and reception of messages, orders and reports of record -- is the peculiar province of the telegrapher class, and that under agreements like the one here involved such work belongs to telegraphers with only such exceptions that have been specifically agreed to by the parties or have been promulgated by tribunals of competent authority. Such exceptions most frequently are because of emergency conditions.

The definition of the term "message, orders, and reports of record" was pretty well settled in Interpretation No. 4 to Supplement No. 13, to General Order No. 27. Awards 4516 and 6419 clearly state the rights of telegraphers to communication work. Even though some awards deviate from the

general pattern, the preponderance of opinion holds that communication of record work, of which train orders is the best example, belongs exclusively to the telegraphers. The awards which deviate from the pattern are based upon a mistaken conception of the value of "custom and practice."

In many of the awards the traditions, customs and practices of the railroad industry as a whole are looked upon as determining the intent of universal scope rule classifications such as "telegraphers", "telephone operators", etc. But some look only to practice on a particular railroad. The first course is the only one by which a common meaning can be applied to the common term found in scope rules of a craft or class with the several carriers. It is quite clear that this view is the only one which can be supported by reference to the history of scope rules. This was the intent and purpose of the congress the United States when it amended the Railway Labor Act to establish the National Railroad Adjustment Board. In the case of Slocum vs. Delaware L. & W. Co. 339 U.S. 239; 94 L. Ed. 795, the Supreme Court of the United States said:

> "The Act thus represents a considerable effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added into the Boards' initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nations's railway system." (Emphasis ours.)

Thus the Supreme Court has decided that the purpose and intent of Congress in establishing the Adjustment Board is to provide a degree of uniformity throughout the nation in the interpretation and application of agreement rules.

The present Scope Rule has not been fundamentally changed down through the years and has the same meaning as that of Supplement No. 13 to General Order No. 27 of the United States Railroad Administration. This directive, along with others issued by the body, delineated the rights of employes and applied to the entire industry on a national basis. It was the intent and purpose to recognize and preserve the right of employes of the various crafts and classifications to perform the work which was generally recognized as being the work of such class of employes. By "generally recognized", we mean in the entire industry and not a small portion of it. Decisions which consider only local custom and practice are not necessarily sound. Award 4356 deals with the differentiation between general and local recognition.

Awards 1671, 2926, 3979, 4900, 5872, 5877, 5992, 6840 deal specifically with the effective custom and practice. Also, in Award 5107 it was said:

> ". . . .If the meaning of the rule be clear and certain, employe acquiescence in a contrary practice from now to kingdom come will not nullify its rights thereunder even though they may be estopped in their rights to retroactive pay for its violation, (Awards 4157, 4129, 4154)."

Briefly, our position is: That, based on the historical tradition, custom and practice throughout the entire railroad industry, the extent of the Scope Rule has been determined

and its meaning is clear and unambiguous. Consideration of this claim on this basis can leave no doubt that telegraphers have the exclusive right to the work of handling messages, orders and/or reports of record and that a local practice to the contrary does not change that right.

Rule 6 of the Agreement provides for the payment of a call. Rule 6 reads as follows:

> "When notified or called to work outside of established hours, employes will be paid a minimum allowance of two (2) hours at overtime rate, and if held on duty in excess of two (2) hours, time and one-half shall be allowed on the minute basis."

Carrier, needing another "crutch" to support its weak position, appears to doubt, without forthrightly saying so, the advisability of referring this dispute to your Board due to the fact that the occurrences upon which the claim is based took place in Canada. There is no good reason to challenge the jurisdiction of your Board. The instant claim is based on a violation of an agreement negotiated and signed in the United States pursuant to the provisions of the Railway Labor Act. Rule 38 of the Agreement reads as follows:

> **"RULE 38 - EFFECTIVE DATE AND CHANGES**
>
> This agreement shall be effective September 1, 1949 (except rates, which are as of February 1, 1951), superseding all other rules, agreements and understandings except those carried as addenda to this agreement, and shall continue in effect until changed in accordance with the provisions of the Railway Labor Act as amended."

Addendum No. 1, relied on by the Carrier, was negotiated and signed at Detroit, Michigan. Article V of the August 21, 1954 Agreement, dealing with the handling of claims and grievances, provides in Section 1(c) for the progressing of unsettled disputes to the National Railroad Adjustment Board.

The agreements apply to all employes in the class and craft covered at all stations and locations on this Carrier's lines. Your Board accepted jurisdiction in similar circumstances and handed down Awards 6155 and 7061.

Employes have clearly shown that the work here involved is covered by the Scope Rule of the Agreement and is reserved to employes under the Agreement, that the agreed-to exceptions do not include this work and that the rules of the Agreement provide for the payment requested. A sustaining award is in order.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The submission of Carrier in this case is made pursuant to request of A. Ivan Tummon, Executive Secretary, National Railroad Adjustment Board, Third Division, in his letter dated January 22, 1959. The submission of Carrier in this case is made without admitting that the Third Division, National Railroad Adjustment Board, has jurisdiction or should docket this dispute.

The incidents upon which complaint is based occurred on the Canadian Division of this Carrier, in the Province of Ontario, Dominion of Canada. The operations of this Carrier

in Canada are not subject to the Interstate Commerce Act. (See First division Award 915 and reference to Railway Labor Act therein.)

The train operations here involved were on what was originally The Amherstberg, Lake Shore and Blenheim Railway Company, The Lake Erie, Essex and Detroit River Railway, and The Erie and Huron Railway Company, all of which companies were incorporated by Acts of Canadian Government authorized to construct lines of railroad which were subsequently merged. The Lake Erie and Detroit River Railway, a Dominion of Canada Corporation, confirmed by Act of Canadian Parliament. Canadian Order in Council P.C. 7814 approved, and an Act of Parliament assented to ratification of lease of these amalgamated roads then known as the Lake Erie and Detroit River Railway to the Pere Marquette Railway. Upon merger of the Pere Marquette Railway into the Chesapeake and Ohio Railway, June 6, 1947, the latter succeeded to the rights of the Pere Marquette under the lease.

Carrier's railroad operations in Canada are subject to the provisions of the Railway Act of Canada and Regulations of the Board of Transport Commissioners of Canada. Employer-employe relations in Canada are subject to applicable Dominion and Provincial laws as to regulations of appropriate agencies of the Dominion and Provinces.

Claimants in the dispute of the Organization here seeks to subject to your Board are covered by a collective bargaining agreement, which, insofar as it applies to employes in Canada, is subject to The Industrial Relations and Disputes Investigation Act of Canada. These claimants are Canadian citizens residing in Canada, assigned to work exclusively within Canada on all dates of claim and have seniority only in Canada.

POSITION OF CARRIER:

1. It is the position of Carrier in this case that the dispute here referred to your Board should not be docketed by your Board. It is our further position that should your Board see fit to docket this case it must be dismissed by your Board for lack of jurisdiction.

The claims here presented for your consideration arose in Canada and Carrier states that accordingly, regardless of any agreements, understandings, interpretations, or practices of the parties, or regardless of any argument or data submitted by either party in this dispute, or of any argument or data either party should fail to bring before you, your Board is without authority to make any decision in this case other than to dismiss it for lack of jurisdiction.

The Government of the United States of America and the Constitution which gives that Government authority are not intended to govern labor-management disputes involving foreigners living and working in foreign countries of the world and indeed any gesture by either in that direction would obviously be idle.

A tribunal such as the National Railroad Adjustment Board derives its jurisdiction from the government which creates it, and no jurisdiction which is unfounded in law may be conferred upon a tribunal merely by consent of parties to an agreement. Page v. Wright, 116 F.2d 419.

Carrier submits that as Congress has no authority to extend the jurisdiction of the Railway Labor Act beyond the territorial limits of the United States to the point of exercising control over labor-management disputes arising out of railway operations entirely within Canada and involving only Canadian

employes living and working in Canada, it follows that your Board is without jurisdiction in this case.

> ". . . An extraterritorial effect is not to be given statutes by implication. Accordingly, a statute is prima facie operative only as to persons or things within the territorial jurisdiction of the lawmaking power which enacted it. . . ."

Am. Jur., Statutes, § 487.

Sandberg vs. McDonald 248 U.S. 185, 195.

> "Legislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction."

Carrier submits that the question of whether it was the intent of Congress that the Railway Labor Act operate beyond the territorial limits of the United States has been before the Courts on two occasions. In both cases the Courts have held the Act has no extraterritorial application.

In the first of these cases, Air Line Dispatchers Association vs. National Mediation Board, 189 F. 2d 685, this question was raised because the Mediation Board dismissed an application looking to certification under the Railway Labor Act. The facts reveal that the Mediation Board refused certification because the airline involved and its employes were based outside of the continental United States. It reasoned that, under the circumstances, certification would give the Act extraterritorial jurisdiction -- something which it concluded was never intended by congress. The court agreed, and in its opinion gave the following reasons:

"Turning to the merits of the decision made by the Board, we agree that the Act does not extend to an air carrier and its employes located entirely outside the continental United States and its territories. The basic statute, the Railway Labor Act, defines the carriers to which it applies as 'any . . . carrier by railroad, subject to chapter 1 of Title 49/Interstate Commerce Act/. . . .' (45 U.S.C.A. § 151, First.) 'Employe' is defined as a person in the service of a carrier who performs any work defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission. (Id. § 151, Fifth). The Interstate Commerce Act is limited in its application to common carriers engaged in interstate and foreign transportation on 'but only insofar as such transportation . . . takes place within the United States.' (49 U.S.C.A. §§ (1), (c), 1 (2).) THERE IS NO QUESTION THAT AS APPLIED TO RAILROAD THE RAILWAY LABOR ACT DOES NOT EXTEND BEYOND THE UNITED STATES. By title II (45 U.S.C.A. § § 181-188), approved April 10, 1936, the Act was extended, with certain exceptions not now material, to common carriers by air 'engaged in interstate or foreign commerce' and their employes. (45 U.S.C.A. § 181). But Section 202 of said Title II provides: 'The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employes in the same manner and to the same extent as though such carriers and their employes were specifically included within the definition of 'carrier' and 'employe', respectively, in section 1 thereof.' (45 U.S.C.A. § 182.)

The Board therefore properly concluded that the territorial scope of the Act in its application to air transport was like that applicable to railroads. The legislative history, though somewhat ambiguous confirms this view.

* * * * *

Legislation is ordinarily to be given only domestic application. Foley Bros. vs. Filardo, 1949, 336 U.S. 281, 69 S. Ct. 575, 93 L. Ed. 680 [16 Labor Cases 165,014]. Explicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially. Ibid.

The interwoven structure of the original Act and the amendments respecting air transportation do not supply such explicitness. On the contrary, as said in the well reasoned Determination under review, "The Board fails to find any specific direction in the Act, as amended, permitting it to extend its jurisdiction beyond the continental limits of the United States and its territories." (Emphasis ours.)

The second of these cases, Air Line Steward's Association vs. Northwest Airlines, is reported in 35 labor Cases, paragraph 71, 595. All that need be said in connection with this case is the Court agreed in full with the conclusions set out in the opinion of the Air Line Dispatcher's Case. Supra Language indicating this approval can be found in the following paragraphs:

> "The question is not wholly one of first impression. In Air Line Dispatchers Association vs. National Mediation Board, 189 F. 2d 635 [19 Labor Cases 1 66,340], cert. den. 312 U.S. 8-9, the Court of Appeals for the District of Columbia concluded that the National Mediation Board had properly dismissed an application looking to certification under the Act. . .

* * * * *

> Petitioner would distinguish the Air Line Dispatcher's case, supra, upon the grounds that the air carrier involved operated solely outside the United States and its territories and that the employes involved were not members of aircraft crews. . . .
>
> * * * * *
>
> An Act of Congress is intended to apply within the territorial jurisdiction of the United States, unless a contrary intent appears. The instant case has to do with regulating labor conditions, beyond the bounds of the United States. The intention so to do cannot be attributed to Congress in the absence of a clearly express purpose."

Carrier submits the United States Railway Labor Board held in its decisions Nos. 380 and 394 as follows:

> "The employe in question being engaged in work outside of the boundaries of the United States and the Labor Board being of the opinion that the authority vested in it by the Transportation Act, 1920, does not extend beyond the territorial limits of the United States, the Labor Board decides that it has no jurisdiction in this dispute and the case is therefore removed from the docket and the file closed."

This Carrier has previously been advised in another case by the National Railroad Adjustment Board, specifically by the First Division thereof in its Award 11151, made without referee:

"Due to the fact that this claim arose in the dominion of Canada it is held this division has no jurisdiction."

Awards 11149 and 11150 of the First Division, National Railroad Adjustment Board, each appear to involve an instance wherein all parties to a dispute arising in Canada had agreed to apply jointly to the National Railroad Adjustment board for decision. Irrespective of such agreement as reflected by joint submission of these disputes, the board, again without referee, decided it had no jurisdiction. First division Award 14082 dismissed a foreign dispute for lack of jurisdiction.

Petitioner in this case will no doubt cite Third Division Award 8693 as evidence your Board under certain conditions has presumed to take jurisdiction of a Canadian dispute. Carrier submits first that Award 8693 appears to be clearly in error in finding that jurisdiction may be assumed by reason of failure of respondent to raise the question. Spencer vs. Patey 243 F.555. Carrier submits further, however, this decision would not be pertinent in any event as in the instant case respondent does raise the question of jurisdiction.

Petitioner in this case may also cite Second Division Award 3093. Carrier submits that the majority in that case relies upon nothing positive in support of jurisdiction other than the fact the parties to the dispute by their voluntary agreement gave jurisdiction to the National Railroad Adjustment Board. Need Carrier again here refer to court citation we have previously given which renders any such agreement a nullity? Does not simple logic dictate that your board in these circumstances none-the-less finds no authority for expenditure of United States funds in the disposition of a foreign dispute?

Does your board presume that in a dispute submitted to you ex parte any decision made without jurisdiction can be final and binding, particularly under conditions such as here, where the losing party may refer the dispute to the foreign agency having authority to dispose of it?

The only question appearing worthy of consideration of any kind in this case is one of whether your Board may assume authority for expenditure of the funds of the people of the United States to the extent involved in docketing this dispute in order to render an award finding you are without jurisdiction, or whether on the other hand the Secretary should simply be instructed to inform petitioner as economically as practicable that the Third Division, National Railroad Adjustment Board, has no jurisdiction and accordingly declines to handle disputes arising in foreign countries of the world.

It is noted the majority in Second Division Award 2806 saw fit to docket a foreign dispute and to pass on its merits in Award 3093, pointing out that an agreement between the parties provided that "unresolved disputes on the property MAY be referred to the National Railroad Adjustment Board." Carrier points out that a similar agreement exists between the parties to the instant dispute. Carrier points out further, however, first, the word MAY is permissive, not mandatory, this in view of alternatives under part 5 of the agreement referred to (Article V of the National Agreement of August 21, 1954). (Emphasis ours.)

Carrier submits that in the instant case, the same agreement which provides that an unadjusted dispute may be cited with your board also provides:

> "6. This rule is not intended to deny the right of the employes to use any lawful action for the

> settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier."

and that "lawful action" in the instant case is under foreign government regulations.

The United States Hours of Service Act defines its jurisdiction as follows:

> "The provisions of (this Act) shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in (this Act) shall include all bridges, and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employes' as used in (this Act) shall be held to mean persons actually engaged in or connected with the movement of any train."

It must be accepted as agreed and understood that this Act, where applicable to train order operators in the United States, has no application of any kind at any time to employes of this carrier in Canada.

It must also be acknowledged that the decision of the United States Supreme Court in New York Central Railroad Company vs. Chisholm, 268 U.S. 29 held that the Federal Employer's Liability Act has no application in the instance of an American plaintiff vs. an American railroad corporation operating also in Canada, in the instance of a fatal injury occurring in Canada. It appears crystal clear that the doctrine laid down in that case applies equally to the Railway Labor Act.

The decisions of United States courts to which we have referred holding that the Railway Labor Act has no application in foreign countries and entirely in harmony with the self-evident fact that any free and independent nation has jurisdiction over operations of any kind within that nation, involving its citizens, living and working within the territorial confines of that nation.

The National Mediation Board has previously declined to take jurisdiction in the matter of a representation dispute involving our road conductor in Canada. See Carrier's Exhibit D attached, copy of letter dated March 11, 1944 from Mr. Thomas E. Bickers, Secretary, National Mediation Board, to Mr. A. F. Whitney, referring to Mediation Board Case R-1161 in which Mr. Whitney is advised that, "the Board cannot vote persons employed in foreign countries." Since it has already been established that part of the Railway Labor Act is not applicable to employes in Canada, it would be incongruous to

hold that another section of the Act is applicable to those employes.

Of primary significance, however, is Carrier's Exhibit E, attached, copy of CERTIFICATION OF BARGAINING REPRESENTATIVES for road train conductors, covering the same group as referred to in the paragraph above, MADE BY THE CANADIAN WAR-TIME LABOUR RELATIONS BOARD, and issued at Ottawa under date of July 20, 1945.

Your Board will find that at the present time the Industrial Relations and Dispute Investigation Act of 1948 (Canadian Dominion law) authorizes the Labour Relations Board to certify bargaining representatives as well as to revoke such certification. YOUR BOARD WILL ALSO FIND THAT THE SAME ACT PRESCRIBES THE PROCEDURE TO BE FOLLOWED IN THE SETTLEMENT OF DISPUTES.

2. As stated in Carrier's opening statement of fact, this submission is made without admitting that the Third Division, National Railroad Adjustment Board, has jurisdiction or should docket this dispute. any and all discussion of the merits of these claims by Carrier in the following paragraphs is without admitting your Board has jurisdiction or should docket this case, and is without prejudice to our primary position argued at length under Item 1 above.

It is Carrier's position that the rules of the Telegrapher's Agreement are not in any way violated by the procedure here complained of.

Form CC-4, Work Permit Card, which the Organization here refers to as a work permit "order", is a printed form, size 3 inches by 4 inches, which has been furnished to all

conductors operating in CTC territory since June 1, 1928, when the first CTC operation went into effect on this Carrier. Photo copy of this form is attached hereto marked as Carrier's Exhibit A. This form was also placed in dispatcher telephone boxes which are located at points specified in the timetable, adjacent to the tracks. The operating rules applicable to trainmen, enginemen, telegraph operators and others in the United States were then revised by a supplemental book of operating rules effective June 1, 1928, which supplement governed our CTC operation.

Rule 412 of the supplemental book of operating rules issued to all operators at that time provided as follows:

> "When obtaining authority from train controller to work upon main track, conductor must fill in blank spaces on work permit card, form CC-4, as authorized by train controller and give copy to engineer. Conductors must supply themselves with blank form CC-4 to be used for this purpose."

At that time the basic collective bargaining agreement between this company and its telegraphers represented by the Order or Railroad Telegraphers was the agreement subsequently filed with your Board which became effective May 16, 1927. Article XVII of that agreement contained precisely the same title and text as was contained in the subsequent basic agreement Rule 25, which was effective September 1, 1949, except that the 1949 basic agreement made reference to a joint agreement with several crafts in 1943 and carried as Addendum No. 1 to the 1949 basic agreement.

CTC operation has been in effect on this Carrier in the United States since June 1, 1928 and no claim of any kind has been progressed to the highest appeal officer claiming

telegrapher's schedule rules have been violated by road conductors complying with the operating rule above quoted.

CTC operation was first placed in effect on our canadian Division between april 1, 1957 and January 9, 1958. Our Canadian operating rules were thereupon supplemented to provide for the same use of the identical form of which had been in effect in the United States since June 1, 1928.

In 1943 a Memorandum of Understanding was entered into between the Carrier and representatives of several labor organizations, including the Order of Railroad Telegraphers, to the effect that train and engine service employes would not ordinarily be required to copy "train orders", "clearances" or "written messages". "Train orders" were defined in this Memorandum of Understanding as being "(Forms 19 and 31)". "Clearances" were defined as being "Form 'A'". This Memorandum also provided that trainmen and enginemen would not block or report trains; however, we do not understand the two details to be here involved. This Memorandum did allow trainmen and enginemen to copy train orders or written messages under certain emergency conditions.

The instant claims are predicated on the argument that the conductor filling out form CC-4 in Canada is copying a train order and a written message as contemplated in the 1943 Memorandum, under circumstances when no emergency existed. It is also alleged Rule 25 (text of which had been in effect during the life of CTC in the United States) was being violated in Canada.

Carrier's Exhibit B attached is copy of final appeal letter to the highest officer designated by Carrier to handle disputes. This gives the substance of the argument advanced in support of one of the three claims here involved on the property.

Carrier's Exhibit C attached is copy of our final declination letter in the same case, dated April 23, 1958. Similarly, declinations were made in the instances of the other two claims here tendered your Board. Carrier's final declination letter quotes Canadian Uniform Operating Rule 266 and the pertinent portion of Bulletin No. 54, both of which were placed in effect in CTC territory in Canada when CTC operation began in that territory.

The conductor in the case of each claim here tendered to your Board did not use a telephone in a telephone or telegraph office, as contemplated in Telegrapher's Rule 25, to contact the train controller. The conductor used a dispatcher's phone located in phone box near the tracks and installed for the use of trainmen and enginemen. Neither the conductor nor other train or engine crew member filed claim or complaint of any kind in these cases under the 1943 memorandum.

The train controller in each case here tendered was a dispatcher. On this property the work of operating CTC machines is assigned to either telegraphers or dispatchers, neither craft having exclusive jurisdiction of this work. Telegraphers handling CTC machines do so under the direction of a dispatcher.

Concerning alleged violations of the Memorandum, Carrier points out that the work here involved is specifically excepted from any coverage by this agreement by Section 2 thereof. This section provides that direct conversation with the train dispatcher about work, permission to occupy main track or reporting clear of main track will not be construed as a violation of the Memorandum. It is immaterial whether the conductor works directly with the dispatcher on these matters under emergency conditions or otherwise. YOUR BOARD

WILL NOTE THE ORGANIZATION HERE TAKES THE POSITION THIS MEMORANDUM WAS VIOLATED AS THERE WAS NO EMERGENCY.

Carrier submits that road conductors operating in CTC territory on this property at all times between June 1, 1928 and April 29, 1943 (the effective date of Memorandum of Understanding referred to as Addendum 1) filled in and used these forms regularly and that these conductors used the form on April 29, 1943 and thereafter, without protest or claim by Telegraphers, or other crafts under this Memorandum in the United States. Does this not indicate conclusively that all parties to the train order memorandum effective April 29, 1943 well understood that a conductor making out a form CC-4 was not copying a train order or written message as contemplated by Section 1 of this regulation, but that he was rather securing permission to occupy main track as permitted under Section 2 of this Memorandum?

If the Memorandum of April 29, 1943 was intended in any way by any party to this agreement to stop the use of form CC-4 by road conductors, then it appears one or more of the five labor parties to it would have taken action to stop such use once this Memorandum was placed in effect.

In 1945 the telegraphers national organization negotiated a rest day agreement with carriers generally, including this carrier. No change of any kind in connection with our form CC-4 was made at that time.

In 1949 when the parties to the current basic agreement undertook to negotiate it they did so in the light of a practice of more than twenty years whereby road conductors regularly filled in form CC-4 on CTC territory. The parties negotiating well understood that during all that twenty years Article XVII

of the agreement of May 16, 1927 was in effect, and that the language of this rule did not deter road conductors from filling in form CC-4. The parties none-the-less settled for the same language in the train order rule of the September 1, 1949 as was contained in the agreement which preceded it. Moreover, the agreement effective September 1, 1949 was negotiated and signed in the light of the fact that this practice of conductors filling out these forms had then continued for some six years under the 1943 Memorandum. This practice continued for another period of more than nine years before claim was progressed.

Carrier points out that in view of the facts recited above, if your Board were able to properly assume jurisdiction in this case the claims would stand to be declined under many prior awards of your Board, including at least two involving the Chesapeake and Ohio Railway (Chesapeake District).

Pertinent quotations from a comparative few of these awards are as follows:

AWARD 1145 (I. L. Sharfman)

The Order of Railroad Telegraphers vs.
The Chesapeake and Ohio Railway Company.

"In addition, it must be noted as of substantial significance that while the current Agreement dates from 1927, the present form of line-up from 1931, and the precise method of handling here involved at least from 1934, this is the first claim submitted by the employes questioning the propriety of the established practice. Although it must be conceded that the long continued acquiescence of the employes cannot operate to alter the scope rule of the Agreement, such acquiescence is clearly relevant to a determination of the intent of the parties

as to the applicability of the scope rule to the situation here in dispute."

AWARD 5582 (Francis J. Robertson)

**The Order of Railroad Telegraphers vs.
The Chesapeake and Ohio Railway Company.**

"Since 1912 and up to the date of Award 1145 at least eleven Agreements were entered into between this Carrier and the Telegraphers and since the latter date the Agreement affecting this dispute, effective October 16, 1947 has been consummated. These Agreements carried forward the same Scope Rule without material change with respect to classifications covered. Thus, in the instant case we are confronted with a factual situation not unlike that which faced us in Award 4791. What we had to say there is equally applicable here and the principles which formed the basis for our Opinion in that case are controlling here."

AWARD 4791 (Francis J. Robertson)

"We are fully cognizant of, and are in agreement with, the many Awards of this Board holding that repeated violations of an Agreement do not change it, or stated differently, that a long existing practice does not change the clear terms of an Agreement. However, it is also a well-established rule of contract construction that the re-adoption of a rule generally has the effect of re-adopting the mutual interpretation placed upon it by the parties themselves. In fact, it evidences an intent not to change the existing interpretations. Both parties at the time of the adoption of the Scope Rule into the current Agreement were fully cognizant of the fact that under the previous Agreements the work of obtaining train lineups by telephone was not being treated as exclusively reserved to the

classes of employes listed therein. Consequently, it must be held that the readoption of the rule, in the instant Agreement as well as in other earlier Agreements, was not intended to change the meaning previously given to it. It follows that under this Agreement on the property it is not a violation of the Scope Rule of the Telegraphers' Agreement for the section foreman to have obtained the lineups in question by telephone from the dispatchers."

AWARD 4922 (Robert O. Boyd)

". . . and the dispatchers, for as many as 10 years, have performed the work complained of when the Side-Wide operator was not on duty. Notice should also be taken of the fact that no objection to this was made by the Organization for eleven years after the Agreement of 1936 was entered into; and it was not discussed when the Agreement of March 1, 1945, relating to rest days, was negotiated.

AWARD 5101 (Jay S. Parker)

"In between the two extremes to which we have referred, however, is a line of decisions basically founded upon the fundamental and universally recognized legal principal (see Awards 3727, 2436, 1435, 1397, 1257 and 507) that where a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself."

"The record in the instant case makes it clear, as we have heretofore indicated, that for at least forty years during the portion of the day involved the work in controversy has been performed by hostlers and has never, either at Sausalito or Tiburon, been performed by Clerks. That situation existed when the contending Organization negotiated the first

Agreement effective April 1, 1926. It prevailed at the time of the negotiations resulting in the Memorandum Agreement, effective December 26, 1946, amending diverse rules of the Agreement, including the Scope Rule. It continued during the negotiations which brought about the Memorandum Agreements of July 20, 1949 and July 31, 1950. Notwithstanding the practice was not even mentioned, referred to or abrogated by the terms of any of these Agreements. Indeed it was not until March 23, 1950, that there was any complaint thereof or effort made to change it. The Organization seeks to avoid the effect of this delay by the assertion it had no knowledge whatsoever of the alleged violation until the claim was first submitted by its representative. That is not a meritorious or valid excuse. In Award 1609 and many others, to which we need not refer, this Division of the Board has held that under facts similar to those existing here the Organization is chargeable with knowledge of the working conditions in operation on the property and that we must assume it had knowledge of what is now claimed to be violation of the Agreement."

AWARD 5747 (Adolph E. Wenke)

"When a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself."

AWARD 6007 (Fred W. Messmore)

"Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. See Award 5404, and awards cited therein on this principle. See also Awards 5564 and 2436."

AWARD 6112 (Fred W. Messmore)

"When a contract is negotiated, and existing practices are not abrogated or changed by its terms, such practices are enforceable to the (sic) extent as the provisions of the contract itself. See Award 5747. There are other awards of this Division to the same effect too numerous to cite.

AWARD 6379 (Peter M. Kelliher)

"The long established past practices were not changed by the Collective Bargaining Agreement and in fact were continued for many years after the Agreement and they are enforceable to the same extent as the provisions of the contract itself. See Awards 5331 (Robertson), 5768 (Smith), 4889 (Carter) and 4193 (Carter.)"

AWARD 6996 (Edward F. Carter)

"Historically and traditionally the work has been that of the Train Dispatchers in the Nashville Train Dispatcher's office. By their own actions and by their own words over a period of thirty-five years or more, they have treated the disputed work as that of Train Dispatchers. Tradition has fixed the status of the parties to this dispute. We must conclude that the parties through the years intended to limit any exclusive claim to the disputed work on the part of the Telegraphers. We adopt the reasoning contained in Award 4922. A denial Award is required."

The Third Division is by no means alone in rendering consistent decisions such as cited above. See First Division, National Railroad Adjustment Board Awards 11555, 11583 (Scott) 13015 (Jackson), 13701 (Robertson), 1377 (Donaldson), 14577 (Coffey) and 14683 (Smith).

Carrier submits that in view of the above, any award by your Board on merits in this case must be made in the light of these facts: Operating rules in effect on United States Divisions of this Carrier since 1928 have required the conductor to fill in form CC-4 and the conductor has done so since that date. During that time the employes have revised and/or re-negotiated rules covering working conditions in at least three instances wherein a national officer of the Organization as well as the General Chairman participated. Those instances were, first, negotiation of the so-called train order memorandum in 1943, printed as Addendum No. 1 in the basic agreement effective September 1, 1949, copy of which has been furnished to your Board; second, negotiation of the so-called rest day rule in 1945 in which case the General Chairman on this property was assisted by a national officer, and third, re-negotiation of the entire basic agreement of May 16, 1927, in which negotiation the General Chairman was again assisted by a national officer of the Organization. Our practice of requiring conductors operating in CTC territory to fill in form CC-4 was not changed in any way as a result of these negotiations. Other labor organizations parties to the "Addendum No. 1" memorandum have filed no claims or protests because of conductors filling out this form during the sixteen years this memorandum has been in effect. Many awards of this Division made apart of the record in this case accordingly point the way to a decision denying the claims here before you.

Carrier submits there is a very good reason the use of form CC-4 has gone unchallenged for some twenty-nine years, during the entire life of CTC operation on this carrier, under two basic agreements, and under a special agreement dealing specifically with the matter of "written messages" and "train orders". The employes of all crafts have, with the exceptions

contained in the instant claims, appreciated from the first after having been instructed in the basic operation of CTC that here is a method of operation which does not require train orders, and that form CC-4 does not serve the purpose of a train order. The train controller serves those purposes of a train order which are not served automatically by automatic blocks when this train controller blocks the levers operating signals at each end of the territory "given" to the work extra in any case. There is no need to give orders to any train or trains indicating that the work extra is given exclusive rights over all trains between specified points and for specified periods of time. Automatic block signals do this, and as a precaution the controller has frozen signals to protect the extra and will keep these signals frozen until the extra has reported clear of working limits. The conductor of the work extra simply notes on form CC-4 pertinent information for his use, which constitutes specific time and place information concerning the "right to occupy main track" which he has secured from the dispatcher.

Other trains in the territory affected by a work extra holding the track are governed by signals. They receive no copy of Canadian uniform code operating form H (5) order, (United States form S-H (4), when a work extra is given exclusive right over all trains). Up to this time the employes have recognized that the main purpose of the CC-4 is to insure that the work extra will report into clear promptly and thus avoid delay to other trains, it being assumed the controller will thereupon promptly remove blocks.

Up to the present time our employes have recognized CTC as:

> ". . . a system of railway operation by means of which the movement of trains over routes and

> through blocks on a designated section of track or tracks is directed by signals controlled from a designated point, superseding time table superiority of trains, and without requiring the use of train orders." (Emphasis ours.)

and it is pointed out your Board in its Award 4452 recognizes the above quoted.

In summary, Carrier submits that as previously pointed out this Carrier has been advised by an award of the National Railroad Adjustment Board on the specific question of whether the National Railroad Adjustment Board has jurisdiction in the matter of a labor-management dispute incident to the operations of this Carrier in Canada, and occurring in that country. The previous decision given this Carrier by the National Railroad Adjustment Board, in response to the argument of this Carrier that said Adjustment Board was without jurisdiction, was made by the First Division of this Adjustment Board in its Award 11151, without referee. This decision was that the Board did not have jurisdiction.

Carrier submits that in such circumstances the following language of your Board, sitting with Referee Coffey, in your Award 6935 appears apropos:

> "If, as we maintain, our awards are final and binding, there must be an end sometime to one and the same dispute or we settle nothing, and invite endless controversy instead."

Data submitted by the Carrier in this case in support of its argument that your Board does not have jurisdiction have not been placed before the Employes in handling this case on the property. This carrier had no indication of any kind this

dispute would be progressed to your Board by the Employes until receipt of notice from the Secretary of your Board, herein referred to.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier has submitted what is in effect a motion to dismiss for lack of jurisdiction. The stated grounds are:

> 1. The employes named in the claim are resident of and employed in Canada. They, in personam, are not within the Board's jurisdiction. They are indispensable parties to the proceedings; and
>
> 2. The alleged violations of the Agreement occurred within the Dominion of Canada; therefore, beyond the jurisdiction of this Board.

I.

JURISDICTION

A. The Indispensable Party Issue.

1. The Elgin Case.

In support of its contention that the employes named in the claim are indispensable parties, Carrier relies upon Elgin, Joliet and Eastern Railway Company vs. G. W. Burley, et al., 325 U.S. 711 (1945); reargued and affirmed, 327 U.S. 661 (1946).

In the first opinion in the Elgin case, the Supreme Court considered the question of the power of a collective bargaining representative to conclude agreements for settlement of employes' grievances and to represent aggrieved employes in proceedings before the Board. The Court ruled that the representative is not authorized, simply in the nature of the case, to settle employes' grievances. The Court went on to say, however, that express authorization by employes involved is not necessary.

In the second opinion, after reargument, the Court held that an employee who has notice of settlement negotiations conducted by the representative concerning the employes' grievances is required to take affirmative steps with regard to his right to have a voice in the settlement, or he may lose that right.

In his dissent to the second opinion, Mr. Justice Frankfurter, with the concurrence of the Chief Justice and Mr. Justice Burton, said the Court erected "a series of hurdles which will be, and we assume were intended to be, almost

impossible for an employe to clear." He characterized the employe's right to challenge the agency of the collective representative as "largely illusory (327 U.S. at p. 668). Subsequent opinions of the courts and quasijudicial bodies engaged in the field of labor relations have supported these characterizations.

The issues resolved in the Elgin case, concerned only the authority of the representative to act for the employe. It does not support Carrier's argument in this case that an employe named in a petition filed with this Board by his collective bargaining representative is an indispensable in personam party to the proceedings.

The record in the case before us raises no issue as to the representative's authority to act. It does prove that historically, alleged violations of the Agreement have been handled on the property in conferences between the employes' collective bargaining representative and representatives designated by the Carrier. In the absence of any showing to the contrary, we must conclude that the Petitioner in this case had and has the authority to act for the employes named in the petition.

2. <u>General Duties of Collective Bargaining Representative</u>

The duties of a collective bargaining representative are found in general terms in the Act.

Sec. 2. First. Imposes the statutory duty upon "employe" and "carrier" not only to make but to maintain agreements; Sec. 2. Fourth. permits the employes to discharge this duty "through representatives of their own choosing"; and, Sec. 2. Second, mandates that all disputes as to maintaining the agreement "shall be considered, and, if possible, decided, with

all expedition in conferences between representatives designated and authorized to so confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

In Sec. 2. First through Tenth. Congress defined the rights and duties of the parties and prescribed in general terms the accommodation of those rights and duties.

3. The Representative's Right to File a Petition

Twenty-two years ago, Mr. Justice Jackson, speaking of the Railway Labor Act, said:

> "Collective bargaining was not defined by the statute, which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement is the United States." (Emphasis ours.)

The philosophy of bargaining that has been "worked out" is disclosed, for the most part, by extensive litigation involving Section 8(5) of the National Labor Relation Act, which was subsequently designed 8(a)(5) of the Act as amended. The following selected cases, however, served to demonstrate the evolving philosophy: Elgin case, supra; Ford Motor Co. vs. Huffman, 345 U.S. 330; Association of Westinghouse Salaried Employes vs. Westinghouse Electric Corp., 348 U.S. 437; Peerless Tool & Engineering Co., 111 NLRB 853, enforced 231 F. 2d 298 (C.A. 7), cert. den. 352 U.S. 893; Smith vs. Evening News Association, 371 U.S. 195.

The Westinghouse and Smith cases deal with the relative statutory rights of an individual employe and of a collective

bargaining representative to bring suit, by authority of Section 301 of the Labor Management Relations Act, against as employer for violation of a collective bargaining agreement. In the Smith case, the Court expressly overruled its opinion in the Westinghouse case. The prevailing opinion holds that either individual employes or their collective bargaining representative have standing to sue an employer for violation of a collective bargaining agreement.

In overruling the Westinghouse case, the Court in effect, endorsed the philosophy of collective bargaining spelled out, by Mr. Justice Douglas, in the dissenting opinion in the Westinghouse case. He said:

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its meaning as respects matters involving the construction and enforcement of the collective bargaining agreement. Individual contracts of employment result from each collective bargaining agreement. But those contracts are the resultant of the collective bargaining system, a system that continues to function and operate after the contracts are made."

While the issue in the Westinghouse case arose out of the interpretation and application of Section 301 of the National Labor Relations Act, amended by the Taft-Hartley Act and the Labor Management Relations Act we can paraphrase Mr. Justice Douglas' opinion to make it equally applicable to the Railway Labor Act. This we can do without transgression since the legislative history of the National Labor Relations Act discloses that its collective bargaining provisions were patterned by the Congress similar to the statutory scheme of the Railway Labor Act.

The concept of collect bargaining contained in the Railway Labor Act, includes of course, the negotiation of the collective agreement and the settling of the terms of individual contracts of employment which result from the collective agreement. But the collective bargaining relationship does not end there. There remains the statutory duty to "maintain agreements", and this duty is imposed upon carriers, employes and their collective bargaining representatives alike. We know that collective bargaining in the railroad industry has produced a permanent, organized relationship between the "representatives" and the "carrier", involving a day-to-day administration of the collective agreement. It involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employe rights already secured by contract. The representative not only has the duty to negotiate collective agreements, but also the statutory obligation to police and administer the existing agreements. The administration of the collective agreement is its life and meaning.

It is now well established that the processing of disputes, in the railroad industry and industry generally, growing out of interpretation and application of agreements is a part of the collective bargaining process; and recourse to this Board to resolve and settle such disputes, in the railroad industry, is by statute the exclusive ultimate step in the process (Sec. 3. First (i) et. seq.) What the representative obtains in the collective agreement it should be entitled to enforce or defend in this forum. Were we to disallow it that standing, we would destroy the statutory scheme of the Act.

We can visualize situations where an individual employe affected by a violation of an agreement, for reasons of his own, would not initiate or join in processing a violation of an

agreement; or, a situation where no employe is singularly involved. Under such circumstances, the only way in which the integrity of the agreement can be maintained is by recognizing the standing of the representative to process the alleged violation on the property and, if necessary, petition this Board as provided for in Sec. First (i). That this is the legislative intent is made clear in Sec. 3. First. (p) which makes clear that the "petitioner" and the person [employe] aggrieved may be different parties.

Notwithstanding that a petition has been filed by the representative, an employe involved may elect to join, in personam, in the proceedings; and, should a representative fail or refuse to file a petition in a case, initiate and properly processed on the property, which an employe feels is meritorious, the employe may, of course, file with us, on his own, a petition.

The question whether the representative has authority to petition this Board does not turn on technical agency rules. We are dealing here with specialized problems in a specialized field, with a long background of custom and practice in the railroad world. The aim of the Act is a permanent conference and negotiation between the carriers on the one hand, and the employes through their statutory representatives on the other.

A carrier is under a legal duty to treat with the representative for the purposes of the Railway Labor Act. See, Virginian Ry. vs. Federation, 300 U.S. 515. Our consistent recognition of a representative as a petitioner sole, until now unchallenged, is nothing more than an emanation of the duty.

CONCLUSION

For the foregoing reasons, we find that: (1) a representative is proper party, sole, to petition this Board; and (2) an employe adversely affected by a violation of the collective agreement is not an indispensable in personam party to proceedings, initiated by his authorized statutory representative, before this Board.

B. The Issue RE: Sites of Violation

Carrier's second ground, asserted in its motion to dismiss the petition for lack of jurisdiction, is that the alleged violations occurred in Canada -- therefore, outside the Board's jurisdiction. For the most part, in support, it has advanced the same arguments, citing the same cases and authorities, as were presented in Award No. 11639.

In Award No. 11639, as here: (1) the Agreement was executed in the United States; (2) employes working in Canada were included in a single collective bargaining unit with employes in the United States, without governmental edict; (3) within the United States, Petitioner is a "representative" and Carrier is a "carrier" within the meaning of those terms as defined in Section 1. First and Sixth of the Act and both are subject to and within the jurisdiction of the Act; and (4) the employe allegedly damaged, by violation of the Agreement, worked in Canada. The facts in the instant case differ in only one material respect, which we consider, infra.

We affirm Part II of our opinion -- THE JURISDICTION ISSUE -- in Award No. 11639 and incorporate it herein by reference thereto.

It is to be borne in mind that a motion to dismiss for lack of jurisdiction is and must be addressed to the petition; not to be claim.

1. The Material Difference

In Award No. 11639, the Agreement vested holders of positions in Canada with seniority rights to positions in the United States.

The Agreement in this case, Rule 13, divides the system into two seniority districts; one covering employes in the United States, the other employes in Canada, seniority "not [to] extend between Districts. . ."

2. Carrier's Contention

Carrier contends that since the holders of positions in Canada have no seniority rights to positions in the United States, this Board is without jurisdiction to entertain a claim involving an alleged violation of the Agreements with respect to the holder of a position in Canada. To do so, Carrier argues, would be to extend the law of the United States extraterritorially.

Carrier places the emphasis on the claim of an employe to be made whole for damages resulting from an alleged violation of the Agreement -- not on the dispute as to interpretation of the Agreement.

3. The Extraterritorial Issue

We agree with Carrier that the laws of the United States may not invade the sovereignty of another nation. See the Airline cases cited in Award No. 11639. But, for reasons

hereinafter set forth, we do not agree that our interpreting the Agreement before us would be such an invasion.

4. Resolution

Carrier insists that there is no relation between a claim for money resulting from alleged violation of a collective agreement and a petition for the interpretation of a collective agreement. But surely this is to sever what is organic. It wholly disregards the nature of such a collective agreement, its implications and its ramifications.

Carrier would have us consider the Agreement not as a whole, but as two separate agreements - one for employes in Canada; the other for those in the United States. This, where the parties have agreed to a collective bargaining unit, would be destructive, obviously, of the unit; thus, an antithesis.

The gravamen of the case before us, made certain by the Act, is the settling of a dispute as to the interpretation and application of the Agreement [Sec. 3. First. (i)]. The passing on the claim for money damages is incident thereto.

Theoretically, the Act seeks to dispel the economic forces that could be brought to bear at the expense of the public's interest. It not only seeks to avoid ills from a present dispute; but, to avoid disputes of the same nature in future, quite apart from the technical questions of res judicata.

All employes in the unit to which an aggrieved employe belongs, regardless of their respective work locations, have a real and legitimate interest in a dispute as to the interpretation of the collective agreement. Each of them employed in the United States, at some later time, may be involved in a similar

dispute. We cannot deny them their day in court before this Board without offending the intent of the Congress.

It is not the locale where the incident giving rise to the dispute occurred that is governing. It is, instead, the unit-wide disputes as to the interpretation of the Agreement. Such boundaries encompass, within the Agreement, Carrier's employes within the United States.

The Congress has ordained that where "minor disputes" arise between "employe", acting through his "representative" and a "carrier" as to interpretation and application of an existing collective agreement this board is the exclusive ultimate forum to which parties to the dispute has. Chicago River case, 353 U.S. 30 (1957).

We repeat, for emphasis, Carrier's employes in the collective bargaining unit employed within the United States, through their "representative," Petitioner herein, are de jure parties to the dispute as to interpretation and application of the Agreement. To deny them this status would be contrary to the statutory scheme in that it would give rise to the ills which the Act was designed to prevent.

As to all employes being de jure parties, see The Wallace Corp. vs. NLRB, 323 U.S. 248, in which the Court, defining the duty of a bargaining agent, said, at page 255:

> "By its selection as bargaining representative, it [the representative] has become the agent of all the employes, charged with the responsibility of representing their interests fairly and impartially."

CONCLUSION

We find and hold that this Board has jurisdiction. We, accordingly, deny Carrier's motion to dismiss the petition for lack of jurisdiction.

II.

THE MERITS

A. The Facts

1. The Advent of CTC.

The collective bargaining unit consists of two seniority districts - "No. 1 seniority district shall include all stations in the United States; No. 2 seniority district all stations in Canada. . ." (Rule 13).

In 1928 Carrier installed Centralized Traffic Control (CTC) as automation, on its system within No. 1 seniority district and thereupon promulgated Operating Rule 412, which reads:

> "When obtaining authority from train controller to work upon main track, conductor must fill in blank spaces on work permit card, form CC-4, as authorized by train controller and give copy to engineer. Conductors must supply themselves with blank form CC-4 to be used for this purpose."

In 1957, shortly before the dates of violation alleged in the claim, it installed CTC on its system within No. 2 seniority district and promulgated a similar operating rule, applicable to that district, providing for the use of Form CC-4.

CTC is:

> ". . . a system of railway operation by means of which the movement of trains over routes and through blocks on a designated section of track or tracks is directed by signals controlled from a designated point, superseding time table superiority of trains, and without requiring the use of train orders." (Emphasis ours.)

After promulgation of the aforesaid operating rules, Form CC-4 was furnished to all conductors operating in CTC territory and they proceeded to employe the procedure and form prescribed in the operating rules.

The following is a reproduction of a executed Form CC-4, the emphasized portions of which were filled in by a conductor with information received via telephone, from the dispatcher; and, then, delivered, by the conductor to the designated engineer:

"WORK PERMIT CARD FORM CC-4

December 9, 1957, 6:01 P.M.

To C&E Eng. 5731 at Kingsville

You may work between S. Signal M-31-3 and S. Signal N-29 until 6:15 P.M.

(signed) HRM."

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2. Collective Bargaining History

At the time CTC was introduced, on No. 1 seniority district, the rights of the parties were memorialized in a basic agreement which had been executed in 1927. It included Rule XVII - Train Order Rule -- which is identical to Rule 25 of the Agreement, not before us. The Rule reads:

"RULE 25 - HANDLING OF TRAIN ORDERS

No employes other than those covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available, except in emergency, in which case the telegrapher will be paid for the call. (See memorandum of understanding effective May 15, 1913 - Addendum No. 1)."

As shown, within the parentheses of Rule 25, the parties entered into a Memorandum of Understanding, in 1913, which insofar as is pertinent, reads:

"1. It is agreed that effective May 15, 1913, train and engine service employes will not, except in case of emergency, be required or permitted to copy, or train dispatchers or operators be required or permitted to telephone direct to train and engine service employes, train orders (Form 19 and 31), clearances (Form A),or written messages, nor to block or report trains.

2. It is further understood and agreed that direct telephone conversion between train dispatcher or operator and train and engine service employes about work, reporting train or engine clear of main track, permission to occupy main track, or permission to cross from one main track to another, will not be construed as a violation of this agreement." (Emphasis ours.)

This Memorandum was executed about 15 years after the advent of CTC in the United States part of the system; and, 11 years before CTC was installed on the Canadian part of the system.

On June 6, 1947, Carrier acquired by merger, that part of its system, in Canada, which is now No. 2 seniority district.

The 1927 Agreement was renegotiated in its entirety in 1949. The 1943 Memorandum of Agreement was incorporated therein as Addendum 1; and, the train order rule was unchanged.

The 1949 Agreement is that which is now before us. It was the existing Agreement at the time of the occurrences specified in the claim and antedated the installation of CTC within No. 2 seniority district by approximately eight years.

3. Occurrences Giving Rise to the Claim.

Each of the Claimants is the holder of the only position of Agent-Operator, at a station in Canada (see Rule 25 of the 1949 Agreement), which positions are covered by the Agreement. The alleged violations all occurred outside the regular hours of each Claimant.

In each instance of alleged violation, the conductor of a train Extra received and copied direct from the train dispatcher orders which he wrote on Form CC-4, repeated to the dispatcher and then delivered a copy of the filled in Form to the engineer of his train. One of these Forms, as filled in, which was actually used in one of the instances of alleged violation - and differs only from the other in detail - is set forth in II A(1), above.

4. Petitioner's Contentions.

Petitioner contends that: (1) the communication accomplished by Form CC-4 from the dispatcher to the engineer through the conductor is a train order within the contemplation of Rule 25 of the Agreement; (2) said type of communication is a written message and a message, order or report of record; (3) communications of record and train orders have been historically recognized as work reserved to Telegraphers; (4) Carrier's employment of Form CC-4 in communications from dispatcher through conductor to engineer invades the doing of work contractually reserved to Telegraphers; (5) the communication of the train order, written messages, and/or message of record are contractually required to be performed at each station through the lone Agent-Operator even though required during hours when the Agent-Operator is not regularly on duty; (6) Carrier, having

failed to have the Agent-Operator communicate the train order and/or message of record or written message, violated the Agreement; and (7) Carrier having violated the Agreement, Claimants can be made whole, in their contractual rights, and the Agreement "maintained", only by Carrier being ordered to pay each of them for a call, as provided for in Rule 6 and 25 of the Agreement.

5. Carrier's Contentions.

Carrier contends:

(a) The Scope Rule of the Agreement is general in nature. It is an established principle that where this is so, Telegraphers, to prevail, must prove that the work involved has been historically, traditionally and exclusively performed by employes within the collective bargaining unit. Therefore, since the facts in this case prove that the procedure of communicating between dispatcher-conductor-engineer, using Form CC-4, has been employed since 1928, the claim must be denied;

(b) The 1927 Basic Agreement, with reference to the Train Order Rule, was amended by Memorandum of Understanding in 1943. In 1945, the parties negotiated a Rest Day Agreement. In 1949, the parties renegotiated the Basic Agreement in its entirety. The 1949 Agreement did not change Train Orders Rule and continued in force and effect the 1943 Memorandum of Understanding which was incorporated as Addendum 1. It is an established principle that where the parties renegotiate a rule, without change, it must be conclusively presumed that it was their intent to endorse long existing unquestioned practices. Therefore, since no issues was raised by Petitioner as to the past practices in the use of Form

CC-4, Petition is estopped from claiming that the practice violates the Agreement;

(c) Paragraph 1 of the 1943 Memorandum of Understanding contractually restrains Carrier, as far as Train Orders are concerned, only from communicating, in the manner prescribed therein; "train order (Form 19 and 31). Since, therefore, Form CC-4 is not expressly referred to, the restraints of paragraph 1 are not applicable to its use.

III.

THE ULTIMATE ISSUES

The ultimate issues are whether:

(a) The communication effected through use of Form CC-4 is a train order - a communication of record - a written message;

(b) The communicating is work reserved, by the Agreement, to Telegraphers; or, work which by the terms of the Agreement, and practice, has been excluded from its scope.

IV.

RESOLUTION

A. The Scope Rule

The Scope Rule of the Agreement is the same, substantially, as that in Telegraphers' Agreements throughout the railroad industry. On its face, it is general in nature. But, in the specialized field of labor relations in the industry, which

the Congress by enactment of the Act recognized, we must read the Rule in the light of the long history of bargaining between Telegraphers and carriers with reflection of commonly understood meaning.

The work of communicating train orders, messages of record and written messages, has been historically recognized as belonging to Telegraphers. While the advent of CTC made substantial inroads on the volume of the work, that which has remained after automation, whether accomplished by telephone or written messages, has been zealously protected and retained by Telegraphers. The same is true as to communications of record.

Interpreting the Scope Rule in the light of its history, industry wide, and the common understanding of the parties - Telegraphers and carriers - as to its meaning, we find that it specifically embraces Telegraphers' exclusive right to the work of communicating training orders and messages of record.

B. The Train Order Rule

Rule 25 of the Agreement makes certain that the communication of Train Orders is reserved to Telegraphers except to the extent qualified by Addendum 1, which is the 1943 Memorandum of Understanding.

Addendum 1 prohibits employes of a craft or class of employes, other than Telegraphers, "to telephone direct to train and engine service employes, train orders (Forms 19 and 31) . . . or written messages . . ." Carrier argues that "train orders (Forms 19 and 31)" means that the prohibition is limited only to the forms identified in the parenthesis. We do not agree. As written, the forms designated are examples and not inclusive. It is not the make-up of the forms or their

identifying numbers which control. It is instead the substance of the message. If it is in substance a train order, its communication, by the means prescribed in paragraph 1 of Addendum 1, is reserved to Telegraphers.

It is generally accepted that train orders are messages which govern the movement of trains. The messages here involved, communicated through the use of Form CC-4, are within this definition. Therefore, the work of communicating them is, by interpretation and application of the agreement, reserved to Telegraphers. In transmitting by the method complained of, Carrier violated the Agreement.

C. Written Messages

Paragraph 1 of the 1943 Memorandum of Understanding also prohibits other than Telegraphers from communicating written messages. Since a dispatcher must record the information which he transmits to the conductor for filing in Form CC-4 and then delivered by the conductor to the designated engineer, the procedure constitutes communicating both a message of record and a written message. In transmitting by the method complained of, Carrier violated the Agreement.

D. The Weight of Past Practice

Carrier asserts that because Telegraphers made no complaint, in the 1949 negotiations, as to the past practice of using Form CC-4, it, by its silence, agreed to the continuation of the practice and is now estopped from claiming it violates the Agreement. We are cognizant that many of our Awards are predicated upon such a principle. This principle is in seeming conflict with other of our Awards; for example, Award No. 7195, in which we held:

> " . . . evidence of practice cannot abrogate the Rule, although it may bar past violations. Either party may at any time require that the practice be stopped and the Rule applied according to its terms (Awards Nos. 5872, 5979, 6144)."

In this case, we have found that the action complained of violated the Scope Rule, the Train Order Rule and paragraph 1 of the 1943 Memorandum of Understanding. We believe that the principle enunciated in Award No. 7195 is sound and appropriate in the disposition of this case.

CONCLUSION

For the foregoing reasons, we find that the Carrier violated the Agreement as alleged; and the monetary remedy prayed for is as provided for in the Agreement. We will sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June 1961.

CARRIER MEMBERS DISSENT TO AWARD No. 12667
DOCKET No. TE-10995

The Majority has committed serious error and gone far afield in an effort to find that this Board had jurisdiction over the parties and the dispute. The Railway Labor Act, and not some other statute, is the sole source of this Board's authority and the parties over whom the Board has jurisdiction are plainly set forth in Section 3, First (i) of the Act, viz., "an employe or group of employes and a carrier or carriers". The claimants in this case are foreign nationals employed exclusively outside the territorial limits of the United States and the consistent and only judicial authority interpreting the Railway Labor Act in this respect is that foreign nationals exclusively employed outside the territorial limits of the United States are not "employes" under the Railway Labor Act1/; hence, the Board lacked jurisdiction over no less than one of the parties. The Board also lacked jurisdiction over the Carrier insofar as this case is concerned because the Railway Labor Act only covers carriers subject to the Interstate Commerce Act (Section 1, First) and the Interstate Commerce Act only covers transportation insofar as it takes place within the United States. (49 U.S.C.A., Chap. 1, Sec. 1 (l)c and (2).) in sum, the Carrier here, insofar as it operated in the Dominion of Canada, was not a carrier subject to the Interstate Commerce Act and, hence, not a carrier within the meaning of the Railway Labor Act. As concerns the dispute,

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1/ Air Line Dispatchers Ass'n. vs. National Mediation Board, 189 F.2d 685, cert. den. 342 U.S. 849; Air Line Stewards and Stewardesses Assn. vs. Northwest Airlines, Inc., 162 F. Supp. 681, 267 F. 2d 170, cert. den. 361 U.S. 901; Air Line Stewards and Stewardesses Ass'n. vs. Trans World Airlines, 173 F. Supp, 369, 273 F.2d 69, cert. den. 362 U.S. 988.

it arose wholly outside the territorial limits of the United States. The same prevailing judicial authority is that the Railway Labor act has no extraterritorial application and since this Board is a creature of the act, it is without authority to entertain disputes arising outside the territorial limits of the United States. The niceties of definition of collective bargaining, etc., have no bearing on the jurisdiction of this Board in the respects herein noted.

On the merits of the dispute the Majority is equally in error. The award in part, correctly holds that the Scope Rule was generally in nature in conformity with the consistent line of Awards, e.g., Awards 11506 and 12856 by the present Referee, but departs therefrom when it attempts to establish industry wide work allegedly reserved to telegraphers because there is "industry wide reservation of the work to telegraphers". (Award 12356 Dorsey.) The only practice, custom and tradition that can be considered that existing on this Carrier's property (Award 12356 -- Dorsey and on the basis the claim should have been denied. The Majority also errs in its consideration of Addendum 1 because the practice prevailed without change through the negotiation of Addendum 1 in 1943 and revision of the Agreement in 1949, thereby indicating the intent of the parties. (Award 12169 Dorsey.) Thus, what was here involved was never considered to be in violation of the Agreement and the Majority's conclusion to the contrary lacks substance.

For these and other reasons this Award is wholly erroneous and we dissent.

P. C. Carter
D. S. Dugan
W. H. Castle
T. F. Strunck
G. C. White

Award No. 452
Case No. 514

SPECIAL BOARD OF ADJUSTMENT NO. 570

Established Under
Agreement of September 25, 1964

Chicago, Illinois - May 17, 1978

PARTIES TO DISPUTE:

System Federation No. 4
Railway Employes' Department, AFL-CIO
Carmen

and

Chesapeake & Ohio Railroad
(Pere Marquette District)

STATEMENT OF CLAIM

1. That the Chesapeake and Ohio Railroad Company violated the provisions of Article I, Section 4, of the Agreement of September 25, 1964, when it failed to give sixty (60) days written notice of the furloughing of Carman William J. Small from his position as lead Car Inspector at Paquette, Ontario, Canada, a repair and inspection point. Such furlough caused by a change in Carrier's operations as set forth in Article I, Section 2(a) transfer of

work and (b) Abandonment, discontinuance, for 6 months or more, or consolidation of facilities or services or portions thereof, and further violated the terms of the Agreement when it refused to allow the aforesaid employee the protective benefits of the Agreement.

2. That accordingly, the Carrier be ordered to make Carman William J. Small whole by compensating him from the loss in wages due to the abbreviated furlough notice and that he be afforded the protection as set forth in Article I of the Agreement.

FINDINGS:

Claimant held a position as Car Inspector at Paquette (Ontario, Canada). On March 6, 1974 his position was abolished and Claimant was furloughed, and there were not remaining positions at Paquette. In addition to inspecting one train a day on a roll-by basis, Claimant would perform minor repair work at a dead-end spur requiring only one man. Work on cars set off at Paquette requiring more than one man was and is performed by carmen working from line-of-road trucks from St. Thomas.

The Organization contends that Claimant was furloughed because Carrier transferred the work from Paquette and abandoned the facility there, and that Carrier failed to give Claimant the requisite 60 days notice under the provisions of Section 2 of the Article I of the September 25, 1965 Agreement.

The Board, after reviewing the record, finds that the claim must be denied. There has been no showing by the Organization, even on a *prima facie* basis, that the furlough was the result of changes in operations due to any of the causes listed in Section 2. Work was not transferred to another location, and the facility (dead-end spur) was not abandoned.

AWARD

Claim denied.

The Board after consideration of the dispute identified above, hereby orders that an award favorable to Claimant not be made. The claim is disposed of as set forth in the foregoing award.

Adopted at Chicago, Illinois, on May 17, 1973

_____

General Member

PUBLIC LAW BOARD #347

AWARD 25

NNG - 2652

PARTIES TO DISPUTE: UNITED TRANSPORTATION UNION
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Brakeman E.C. Graham for the removal of fifteen (15) days actual suspension from his record and payment for time lost as a result of an investigation held at St. James, Ontario, on July 31, 1969.

FINDING:

This Board, upon the whole record and all evidence, finds that:

The Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

The Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

Claimant, a brakeman, was in the cab of an engine operating in Walkerville, Ontario, when the engine failed to stop at the home signal and derailed. Both the engineer and

brakeman were aware of the stop signal. Claimant took no action to reduce the speed of the train.

Claimant argues that as the crew was working beyond 16 hours, they were fatigued, which was the cause of the accident. While there is no 16 hour law in Canada, Article 84 requires that no yardman will be required or permitted to remain on duty for a longer period than 16 hours. The crew took the train to Grand Marais Road, at which point the conductor, on the radio informed the engineer he would telephone the dispatcher that they were close to the 16 hour limit. The engineer suggested they proceed to the next telephone at Chrysler's, from which they notified the dispatcher. At the time, the hours of service were 16:05, or 5 minutes beyond the limit of 16 hours. The dispatcher instructed the crew to yard their train during which the incident occurred.

A review of the transcript indicates three findings of fact:

1. That the crew deliberately worked beyond the 16 hour limit before notifying the dispatcher.

2. That the dispatcher required the crew to continue to work beyond 16 hours, to the extent of yarding their train.

3. That hours of service was not involved as a cause for failure to take proper measures on recognition of the stop signal.

The investigation was fair, and no reason has been shown to remove the discipline assessed.

AWARD: CLAIM DENIED.

ORDER: This Award is ordered effective forthwith.

DATED: February 5, 1970

Detroit, Michigan

Judge Arthur W. Sempliner-
Chairman and Neutral

J. E. Purslow - Carrier Member

J. Burke - Organization Member

PUBLIC LAW BOARD 347
AWARD 87

MEMBERS OF THE BOARD

JAMES BURKE
Organization Member

B.G. UPTON
Carrier Member

JUDGE ARTHUR W. SEMPLINER
Chairman and Neutral

PARTIES TO DISPUTE: UNITED TRANSPORTATION UNION
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Brakeman W. L. Lampman for 100 miles freight rate, additional, account runaround November 28, 1970, St. Thomas, Ontario.

FINDING:

The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

Brakeman L. J. Brown, an assigned employee was posted in the vacation schedule to begin vacation 12:01 Saturday, November 28. Brown did not arrange to begin his vacation on schedule, and was called and accepted a call for 3:30 a.m. Claimant was 1st out on the extra board and claims a runaround on the basis he stood to be called had a vacancy been created through Brown taking his vacation when scheduled.

Claimant's right to work was dependent on a vacancy being created. When Brown failed to begin his

vacation, no vacancy was created, and no run-around occurred. The claim is not supported by any rule which creates a vacancy pursuant to a vacation schedule.

AWARD: CLAIM DENIED

ORDER: This award is ordered effective forthwith.

Judge Arthur W. Sempliner
Chairman and Neutral

James Burke
Organization Member

B. G. Upton
Carrier Member

DATED: May 16, 1972
Detroit, Michigan

PUBLIC LAW BOARD #884

AWARD 5

MEMBERS OF THE BOARD

G.H. BUNDE
Organization Member

J.J. MURPHY
Carrier Member

JUDGE ARTHUR W. SEMPLINER
Chairman and Neutral

PARTIES TO DISPUTE: THE CHESAPEAKE and OHIO RAILWAY COMPANY
UNITED TRANSPORTATION UNION (E)

STATEMENT OF CLAIM

"Time claim in favor of Engr. W. Westover and Fireman V. Clark, for 100 miles runaround, Detroit, February 18, 1971."

FINDING:

This Board, upon the whole record and all the evidence, finds that:

The Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

Claim for runaround when Detroit yard crew was used to take train from Pelton (a point within Windsor) switching limits to Detroit. The train, en route St. Thomas to Rougemere, had outlawed at Pelton. The carrier argues that it was not necessary to use Canadian road crews (claimant) but could use a Detroit yard crew under that section of the Tunnel Agreement readings:

> "Detroit terminal yard crews will handle in both directions between Rougemere and Chesapeake and Ohio tracks in Windsor all Windsor local and Windsor connection cars and all other cars not handled in Canadian division road trains or by car ferry between these points."

The train in question was not local to Windsor, but was a Canadian Division Road Train terminating at Rougemere (Detroit). The work belonged to the Canadian Division Crew.

AWARD: CLAIM SUSTAINED.

ORDER: This award is ordered effective forthwith, and the Carrier is directed to make payment within thirty (30) days.

Judge Arthur W. Sempliner
Chairman and Neutral

G.H. Bunde
Organization Member

J.J. Murphy
Carrier Member

DATED: February 7, 1974

Detroit, Michigan

PUBLIC LAW BOARD #884

AWARD 6

MEMBERS OF THE BOARD

G.H. BUNDE
Organization Member

J.J. MURPHY
Carrier Member

JUDGE ARTHUR W. SEMPLINER
Chairman and Neutral

PARTIES TO DISPUTE: THE CHESAPEAKE and OHIO RAILWAY COMPANY

UNITED TRANSPORTATION UNION (E)

STATEMENT OF CLAIM

"Time claims in favor of Engr. E. Bell and Engr. J. Roberts, dated April 3/71 claiming time held at Harrow."

FINDING:

This Board, upon the whole record and all the evidence, finds that:

The Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

Claimants, en route St. Thomas to Rougemere, were held at Harrow (15 miles East of Pelton) due to yard congestion at Rougemere. Claimants claim sharp practice, for if the train had been allowed to proceed to Pelton, payment would have been paid on a minute basis at overtime rate pursuant to Par. 3 of the Tunnel Agreement as follows:

> "3. Road compensation for the service trip for crews operating westward into Rougemere will end when the engineer arrives at the home signal governing movement over Pelton plant, or behind another train or trains awaiting movement over this plant. Crews will be paid at the overtime rate on the minute basis from the time they so arrive at Pelton until they are tied up and released at Rougemere."

Claimants had not arrived at Pelton, nor were they behind another train awaiting movement into the plant. Road trains may be held at any point and here no rule has been cited preventing the stoppage as performed. Claimants were on duty, under pay, and paid accordingly.

AWARD: CLAIM DENIED.

ORDER: This award is ordered effective forthwith.

Judge Arthur W. Sempliner
Chairman and Neutral

G.H. Bunde
Organization Member

J.J. Murphy
Carrier Member

DATED: February 7, 1974

Detroit, Michigan

Award No. 153
Case No. 153
NEG-D-209-ST

Public Law Board No. 1547

PARTIES TO DISPUTE: Brotherhood of Locomotive Engineers

and

The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of Engineer W. A. Smoke that five-day suspension administered to him after hearing of January 6, 1983, should be set aside, his record be cleared of this discipline and he be reimbursed for all time lost.

FINDINGS: Claimant was suspended for five days for leaving a locomotive unattended and interfering with devices. It is undisputed that he left the engine unattended at Talbot Yard, St. Thomas, Ontario, without applying a hand brake.

A second ground mentioned for the suspension was wedging an air hose bag against the control pedestal, holding down the safety control lever, thus neutralizing the "dead man." Petitioner contends that it is a well known practice of engineers to adopt such measures.

Claimant refused to answer reasonable questions at the hearing that was held in this matter on familiar Fifth Amendment grounds. These are not criminal court proceedings and there was no sound ground for claimant to decline to furnish information that might shed some light on the issues of this case and be helpful to a proper resolution.

The claim lacks merit and will be denied. We find no sound basis for substituting our judgment for that of Carrier in this case.

AWARD: Claim denied.

Adopted at Baltimore, Maryland, June 29, 1984.

Harold M. Weston, Chairman

Carrier Member

Employe Member

Award No.
Case No. 163

Public Law Board No. 1547

PARTIES TO DISPUTE: Brotherhood of Locomotive Engineers

and

The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of Engineer G. T. Baker dated May 17, 1982 for 100 miles runaround. Claim is supported by Rule 25 BLE Agreement.

FINDINGS: A derailment occurred at Delray, Detroit, blocking the main track. In view of the delay due to the derailment and to avoid exceeding the Hours of Service rule, the crew of Train CG-41, operating on the Canadian subdivision from St. Thomas, Ontario to Detroit's Rougemere Yard was released from duty at Winsor, Ontario.

A yard crew from Rougemere Yard, which is 7.7 miles from Winsor, was sent to Winsor to operate CG-41 into Rougemere Yard. It is Petitioner's position that a Canadian District road engineer should have been called from St. Thomas to bring CG-41 into Rougemere. St. Thomas lies 120 miles east of Winsor.

While it may have been more economical in terms of money and time for Carrier to have used the

Rougemere Yard crew for the work in controversy, Carrier must observe its contractual commitments to the Engineers in making work assignments.

Article VIII Section 2 of the BLE National Agreement of July 26, 1978 appears to cover the situation before us. It reads as follows:

> "At points where yard crews are employed, combination road-yard service zones may be established within which yard engine crews may be used to perform specified service outside of switching limits under the following conditions:
>
> (a) Road Yard Service Zones for purposes of this Section 2 are limited to a distance not to exceed fifteen (15) miles for the purpose of handling disabled trains or trains tied up under the Hours of Service Act. The distances referred to herein are to be computed from the switching limits existing on the date of this agreement, except where the parties on individual parties may agree otherwise."

The distance between Winsor and Rougemere is considerably less than 15 miles. Article VIII Section 2 plainly authorizes the use of a Rougemere Yard engine crew to handle a train tied up under the Hours of Service Act and is sufficiently broad to encompass the present situation. No statute, rule or practice to which we have been referred prohibits the use of a Rougemere Yard crew to handle a disabled or outlawed road train from a point off its seniority district, on a foreign railroad or across the international boundary line. Award 5 of Public Law Board 884 does not call for a

contrary holding; it was issued in 1974, well before the signing of the 1978 National Agreement.

AWARD: Claim denied.

Adopted at Baltimore, MD, April 20, 1987.

Harold M. Weston, Chairman

Carrier Member

Employe Member

Award No. 160
Case No. 160
NEG-7918-ST

Public Law Board No. 1547

PARTIES TO DISPUTE: Brotherhood of Locomotive Engineers

and

The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of Fireman R. D. Welter dated July 25, 26, 28 and 29 and June 9, 1982 for FTD or ITD between Pelton and Rougemere for:

CNE 5127	135 minutes overtime
CNE 5128	184 minutes overtime
CNE 5129	156 minutes overtime
CNE 5130	149 minutes overtime
CNE 5138	50 minutes overtime

FINDINGS: Claim CNE 5138 has been withdrawn. The remaining four claims remain to be resolved.

Under the provisions of Addendum 29 of the Firemen's Agreement and Addendum 15 of the Engineers' Agreement, engineers and firemen receive an arbitrary for time consumed between Pelton and Rougemere, at overtime rate, on the westbound and

eastbound legs of the road trip from St. Thomas to Rougemere and return.

It is Petitioner's position that he is entitled to the arbitrary provided for in the above mentioned agreements. However, the UTU-E and the C&O entered into a written agreement on December 11, 1973 that unambiguously provides that the Pelton arbitrary provisions for firemen "will have no application to employees hired after January 15, 1974."

While claimant held a "3/28/66" seniority date for conductors and brakemen, he was not hired as a fireman until May 7, 1977; he holds a promoted date of "12/19/77" as engineer.

We are satisfied that the UTU-E and C&O were speaking exclusively of employment as firemen and engineers when they agreed that the Pelton arbitrary would not apply to employees hired after January 15, 1974. When claimant transferred to the firemen's craft, he forfeited all seniority rights as conductor or brakeman. His status as a trainman prior to 1974 did not vest him with any of an engineman's rights under Addendum 29 of the Firemen's Agreement or Addendum 15 of the Engineers' Agreement.

AWARD: Claim denied.

Adopted at Baltimore, Maryland, June 29, 1984.

Harold M. Weston, Chairman

Carrier Member

Employe Member

Award No. 155
Case No. 155
(NEG-7910-ST)

Public Law Board No. 1547

PARTIES TO DISPUTE: Brotherhood of Locomotive Engineers

and

The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claims of Fireman J. D. Fowler dated May 5, 26 and 30, 1982 under the provisions of Pelton Agreement of the fireman's agreement for:

ITD or FTD at Detroit

5/5/82 CNE 4990 50" FTD
5/26/82 CNE 5989 45" FTD
5/30/82 CNE 4991 50" FTD

Time limit extended to 1/28/83 per A.C. Leone on 1/7/83.

FINDINGS: On each claim date, Fireman Fowler was operating from St. Thomas, Ontario, his home terminal, to Rougemere Yard, Detroit Michigan. He seeks additional final terminal

delay pay at Rougemere Yard, his away-from-home terminal.

The applicable rule provides that

"In freight service all time, in excess of 30 minutes computed from the time engineer reaches switch, or signal governing same, used in entering final terminal yard track where train is to be left or yarded, until finally relieved from duty, shall be paid for as final terminal delay . . . ."

The parties are in dispute as to the location where computation of final terminal delay (FTD) begins.

According to Petitioner, the signal governing entrance to the yard is located at Delray Interlocking and until 1982, the practice "of many years" standing was to show arrival time for trains from Canada when they reached Delray.

We find nothing in Carrier's presentation that explains away Petitioner's statements as to practice or clearly establishes that a different point is the proper location for beginning the calculation of FTD. Certainly, Carrier's Notice No. 56, dated August 4, 1982, is not helpful. It states:

"Effective at once, Final Terminal Delay time for Trainmen and Enginemen on Canadian District Crews operating into Rougemere Yard will start when the rear of the train has passed Delray Tower."

There is nothing to indicate that the "rear of the train" is a proper basis for computing the time when an engineer reaches the appropriate switch or signal.

Petitioner's statements as to a history and practice using Delray Interlocking are reasonable and clear and indeed not effectively controverted or explained away by Carrier. On the basis of that presentation, limited though it may be, and the language of the rule rather than on the basis of the Pelton Agreement, the claim will be sustained.

AWARD: Claim sustained. To be effective within 30 days.

Adopted at Baltimore, Maryland, April 30, 1986.

Harold M. Weston, Chairman

Carrier Member

Employe Member

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21130

THIRD DIVISION Docket Number SG-21059

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Chesapeake and Ohio Railway Company
((P.M. District)

STATEMENT OF CLAIM: Claims of the General Committee of the Brotherhood of Railroad Signalmen on the former Pere Marquette Railroad:

Claim No. 1

(a) The Carrier violated the current Agreement between the Railway and its Communication Department Employes, particularly Rules 209 and 216, when it refused to allow reimbursement of meal expenses for March 19 and 20, 1973.

(b) The Carrier allow Communication and Signal (C&S) Maintainer R. K. Wilkins his expenses as claimed for March 19 and 20, 1973.
(Carrier's File: SG-345 General Chairman's File: 730427-123)

Claim No. 2

(a) Carrier violated and continues to violate the current Communication Agreement, particularly Rules 1, 209, 216, 701(a)(1), and 920, when on October 5, 1973 Communication and Signal (C&S) Maintainers were refused meal expenses starting with September, 1973 expenses. Such

expenses were submitted on C&O/B&O Form X-28 in proper manner as had been done and paid for at least the last seventeen (17) years.

(b) Carrier now reimburse C&S Maintainers Jack W. McKillop, C&O ID No. 2484272, and Ronald F. Fuller, C&O ID No. 2484430, for the following months and amounts: McKillop: September - $10.25, October - $6.20 and November - $9.05; Fuller: September - $45.45, October - $47.30 and November - $42.70.

(c) Carrier further pay Claimants interest on their October and November amounts due them at the rate of 1 percent, per month, compounded monthly, commencing with date of November 16, 1973 for October expenses, and date of December 16, 1973 for November expenses, such dates Claimants should have been reimbursed in accordance with Rule 216.

(Carrier's File: SG-368 General Chairman's File: 73-74-123
73-74-123-7)

Claim No. 3

(a) Carrier violated and continues to violate the current Agreement and its intent negotiated on behalf of Carrier's Communication Employes, particularly Rules 1, 209, 216, 701(a) 1, and 920, when Communication and Signal (C&S) Maintainers named below was notified by Carrier officers on November 9, 1973 and December 6, 1973 to the effect that certain meal expenses submitted on C&O Form X-28 for period shown below would not be allowed as in the past. As a result of this arbitrary action.

(b) Carrier now reimburse Claimants Jack W. McKillop, C&O ID No. 2484272, and Ronald F. Fuller, C&O ID No. 284430, meal expenses claimed on their December X-28 report filed with and refused by Carrier while working away from their assigned headquarters, such expenses claimed thereon: McKillop - $10.55; Fuller - $41.25.

(c) Carrier further pay Claimants interest on the above amounts at the rate of 1 percent per month, compounded monthly, commencing with date of January 15, 1974, the date such expenses should have been paid in accordance with Rule 216.

(Carrier's File: SG-378 General Chairman's File 74-6-123)

Claim No. 4

(a) Carrier violated and continues to violate the current Communication Agreement No. 2, particularly Rules 1, 103, 209, 216, 701(a)(1), 920 and Addendum No. 11, when on or about March 11, 1974 Division Engineer Davis refused payment and/or reimbursement of meal expenses for months of January and February 1974.

(b) Carrier now reimburse Communication & Signal Maintainers Jack W. McKillop, C&O ID No. 2484272, for meal expenses submitted for months of January ($12.20) and February ($8.50); and Ronald F. Fuller, C&O ID No. 2484430, for meal expenses submitted for months of January ($51.60) and February ($42.45), such expenses submitted by both employes in proper manner on Carrier's Form X-28 for months claimed herein.

(c) Carrier further pay Claimants interest on the above amounts at the rate of 1 percent per month,

compounded monthly commencing with date of February 15, 1974 for January expenses and date of March 15, 1974 for February expenses, the dates such expenses should have been paid in accordance with Rule 216.
(Carrier's File: SG-385 General Chairman's File: 74-15-123)

OPINION OF BOARD: The issue presented in this case is whether the Claimants, who are Communication and Signal (hereinafter C&S) Maintainers employed in Canada by the Carrier, are covered by the Communication Department Agreement, as contended by the Employes, or by the Signal Department Agreement, as contended by the Carrier. If their coverage is as asserted by the Employes, the Claimants are within the purview of Rule 209 of the Communication Agreement and reimbursement or their noon-day meal expenses is required. However, if the Carrier is correct, the Claimants are covered by the Signal Department Rule 209 which expressly excludes the cost of noon-day meals from reimbursement.

The record in this dispute is voluminous; however, a study of the whole record indicates that the answer to the basic issue in question can be readily derived from a comparative analysis of the following rules from the two agreements: Sunday and Holiday work (Rule 206 of each Agreement); Holiday Pay (Rule 206½ of each Agreement); leaving and returning to Home Station Same Day (Rule 209 of each Agreement); Gang Headquarters (Rule 217 of each agreement) and Seniority Districts (Rule 405 of the Signal Department Agreement and Rule 408 of the Communication Department Agreement).

The aforementioned Signal Department Rules make specific references to Canadian employes and Canada while the

Communication Department Rules contain no such references. Rules 206 and 206½ of the Signalman's Agreement list holidays in both the United States and Canada for which a qualified employe will receive pay while the comparable rules in the Communication Agreement only list United States' holidays. Similarly, Signal Department Rule 217 designates Ridgetown, Ontario as the gang headquarters for the Canadian seniority district gang and three Michigan locales as gang headquarters for United States seniority district gangs; in contrast the corresponding rule in the Communication Agreement designates only Grand Rapids, Michigan as a gang headquarters. The only reasonable inference to be drawn from the inclusion of Canadian references in the Signalman's Agreement and the omission of such references in the Communication Agreement is that the Communication Agreement was intended to cover employes in the United States while the Signalman's Agreement covers employees in both the United States and Canada. This conclusion is further supported by the Employes' admission that C&S Maintainers in Canada, including the Claimants, are covered by the holiday pay and seniority rules of the Signalman's Agreement (Rules 206½ and 405 respectively) and not by the corresponding rules of the Communication Agreement.

Wholly apart from the above analysis, Rule 405 of the Signalman's Agreement and Rule 408 of the Communication Agreement, both of which define the seniority districts in which they apply, are particularly informative in delineating the employe coverage of the respective Agreements. Signal Department Rule 405 specifically establishes a seniority district called the Canadian Division as well as three seniority districts in the United States and further provides that "seniority rights of employes will be restricted to one district. On the other hand, Rule 408 of the Communication Agreement provides only for a seniority district "composed of that part of the Pere Marquette

District West of the Detroit and St. Clair Rivers" which excludes all of the Canadian division territory. Clearly, the establishment of the foregoing seniority districts by the two agreements shows that the Signal Department Agreement applies to employes in both the United States and Canada while the Communication Agreement is limited solely to employes in the United States. Furthermore, if it had been the parties intent to include the Canadian Division or any employes thereof within the provisions of Rule 408 of the Communication Agreement, the parties could have complied when the 1953 Agreement was written or when the 1967 revisions were made. However, it is apparent on the face of the Agreements that the parties did not choose to do so.

The Employes concede that the Maintainers employed in Canada were covered by the Signalman's Agreement up to the execution of the Communication Agreement in 1953 and the foregoing shows that the record is replete with evidence establishing that these employes are still covered by the Signalman's Agreement and not by the Communication Agreement. Accordingly, Rule 209 of the Signalman's Agreement which expressly prohibits the reimbursement for noon-day meals applies in this case.

This finding is not altered by the Employes' contentions: (1) that the Scope Rule of the Communication Agreement includes the present Claimants, and (2) that a past practice allowing reimbursement for noon-day meal expenses has been established.

The Employes assert that the parties' intent to have the Communication Agreement apply to C&S Maintainers employed in Canada is reflected in the following portion of the Scope Rule of that agreement:

"This agreement covers rates of pay, hours of service and working conditions of all employes specified in Rules 101 to 105 inclusive . . . including employes in the United States classified under Rule 103(b) of this agreement. . . . "

The Employes note that the above passage expressly includes employes in the United States. It is then argued that, since the Canadian Maintainers were covered by the Signalman's Agreement prior to the execution of the Communication Agreement in 1953, the reference to employes in the United States is clear evidence of the parties' intent for the communication Agreement to cover C&S Maintainers in both Canada and the United States. However, this construction of the quoted language is unacceptable since the Employes fail to indicate any rules of contract interpretation which would support a construction requiring the express inclusion of United States employes to carry with it an implied inclusion of Canadian employes. On the contrary, the express provision of the Agreement including employes in the United States indicates that a comparable provision concerning Canadian employes would be required before the coverage of the Communication Agreement could be extended to such employes. Moreover, it must be noted that when parties intend to cover certain employes by an agreement, they generally include provisions expressly accomplishing the intended coverage and, at the very least, use methods less obscure than the indirect method asserted by the Employes in the instant case.

Apart from this provision, the Employes also contend that the Carrier's Canadian employes have received noon meal expenses over a long period of time and that such past practice has just recently been terminated. In this regard, the record reflects that there have been cases in the past where

a supervisor on his own initiative authorized the reimbursement of meal expenses by the Carrier; however, the record also reflects that these decisions have been made by employes who do not have the authority to bind the Carrier at a policy-making level. Prior Board Awards have recognized that actions taken by an operating officer do not constitute a binding interpretation of the Agreement and that such an interpretation can only result from the actions of the General Chairman and the designated officer of the Carrier. Third Division Awards 18064 and 18045. The Employs have failed to offer any evidence to show that an authorized officer of the Carrier has interpreted the two agreements to sanction the reimbursement of noon-day meals for Canadian employes, and thus the Employes' evidence falls far short of showing a firmly established past practice which could prevail in this case. Even if a past practice had been established, prior Board decisions have held that unambiguous provisions of the Agreement prevail over conflicting practices. Third Division Awards 17916 and 13994. Based on the foregoing and consideration of the whole record, it is clear that Rule 209 of the Signalman's Agreement was intended to cover the Claimants in this case. Consequently, their claims must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

Award Number 21130
Docket Number SG-21059

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST: _____
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1976.

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN RASTALL	)	
TIM GOWDY	)	
	)	
On behalf of themselves	)	
and all other persons	)	
similarly situated,	)	
	)	
Plaintiffs,	)	Civil Action
	)	No. 1414-88
v.	)	
	)	
CSX TRANSPORTATION INC.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT

I, WESLEY B. RAYNER, of the City of London in the Province of Ontario, Canada, MAKE OATH AND SAY:

I presently am serving as Dean of The School of Law of The University of Western Ontario, a position I have held for the last three years. Prior to that time, I served as Professor of Law, a position I assumed in 1968. I received a B.A. and LL.B from the University of Western Ontario and an LL.M. from Yale University. I was called to the Bar of Ontario in 1966.

I have taught Labour Law, served as an arbitrator on many cases and have written in the area. Included in my publications is one of the leading texts on Canadian labour law, *Collective Bargaining Law in Canada* 2nd ed. 1986, (Butterworths), which I co-authored with Professor A.W.R. Carrothers and Professor E.E. Palmer.

INTRODUCTION

I have been asked to render an opinion as to whether the federal Canada Labour Code, RSC 1970 c. L-1 requires the settlement of the claims now before the Superior Court of the District of Columbia by arbitration and not by court action. This request raises two issues of law in my view.

First, does s.155(1) of the Canada Labour Code require that all labour disputes arising under a collective agreement falling under federal jurisdiction be resolved by arbitration? Second, if the answer to the first question is in the negative, may an action be brought by individual employees against an employer with respect to matters forming part of the employment contract, especially where the collective agreement contemplates such action?

In my opinion s.155 (1) of the Code does not require that all disputes be settled by arbitration, and that individual employees may bring an action such as the one now before the Court especially where the collective agreement contemplates such action.

Section 155(1) reads:

> "Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the

> parties to or employees bound by the collective agreement concerning interpretation, application, administration, or alleged violation."

This section differs from roughly equivalent sections in several provincial labour codes in that it specifically provides for settlement of disputes without work stoppage "by arbitration, or otherwise", whereas most of the provincial codes, for example Ontario and Quebec, require settlement by arbitration alone. Thus many of the cases decided under the Provincial labour codes, such as *Brunet* v. *General Motors of Canada Ltd.* (1977) 13 N.R.233(SCC), *Le Syndicat Catholique des Employes de Magasins de Quebec Inc.* v. *La Compagnie Paquet Ltee*, [1959] SCR 206, *For Motor Co. of Canada Ltd* v. *Facchinato* (1978), 18 OR(2d) 581 (HCJ), *Ford* v. *Trustees of Ottawa Civic Hospital* (1973), 3 O.R. 437 (HCJ), *Close* v. *Globe & Mail Ltd.* (1967) 1.O.R. 235 (C.A.), *Lawn* v. *Algonquin College of Applied Arts and Technology* (1982), 39 O.R.(2d) arbitration 377 (HCJ) and *Bourne* v. *Otis Elevator Co. Ltd.* (1984), 45 O.R.(2d) 321(HCJ) are readily distinguishable.

There have been attempts to bring a Court action when the arbitration provisions of a collective agreement governed by the Canada Labour Code have been exhausted. These attempts have not met with success as the Court will limit its intervention to a judicial review of the award on the basis of jurisdictional error. Cases such as *Bergeron* v. *Kingsway Transports ltd* (1979), 95 DLR (3d) 749 (Ont. Div Ct.) illustrate this principle.

Similarly in cases where the parties have agreed in their collective agreement to use arbitration to resolve disputes, that agreement limiting the parties to arbitration, even in the context of the federal Code or provincial codes with similar wording i.e. resolution of disputes "by arbitration or otherwise", will preclude an action before the Courts. (See *Henley* v. *Atlantic Provinces*

Special Education Authority, 86 CLLC, 14040. (NSSC); *O'Neill* v. *Canadian National Railway Co. et al*, 81 CLLC 14074; *Bisson* v. *Brotherhood Railway Carmen of America and Canadian Car Company Limited*, 63 CLLC 698).

However, the essence of the lines of cases represented by the *Bergeron* decision or the *Henley* decision is that if the parties in their agreement have chosen arbitration as their method to resolve disputes, that method must be followed. The decisions do not stand for the proposition that the parties must choose arbitration as the sole method to resolve disputes. If such a conclusion were to be reached, the words "or otherwise" would be read completely out of Section 155(1).

The very issue posed by the first question was canvassed by Professor Carrothers in 1961 in his book *Labour Arbitration in Canada* (1961, Butterworths), where he stated at p.21 "The question arises whether arbitration [in the Federal jurisdiction] may be considered a requirement of law. He concludes by stating that the cases tend in the direction that arbitration under the Code is consensual, i.e. not required by law. There is strong indirect authority to support this proposition. I say "indirect" because the issue has come before the Courts in an indirect way.

On judicial review of arbitration decisions, the scope of review is determined, in part, by the nature of the arbitration. If the arbitration is consensual, i.e. a method of dispute resolution chosen by the parties, the scope of review is much more limited, than if the arbitration is statutory, i.e. mandated by statute. In the labour law context, the determination of whether the arbitration is consensual or statutory turns on the wording of the statute which provides for settlement of disputes without work stoppage. Where the Statute requires arbitration (such as the *Ontario Labour Relations Act*, RSO 1980, c.228

s.44), arbitration is mandatory and the arbitrators are statutory arbitrators. However, where the statute provides for "arbitration or otherwise" it has been held that arbitration is not mandatory and that the arbitrators are consensual. [See: *Howe Sound Co.* v. *International Union of Mine Mill & Smelter Workers (Canada) Ltd., Local 633*, [1962] SCR 318, (SCC) *Regina* v. *O'Connell et al* (1967), 64 DLR (2d) 97 (NSSC). Thus the reasoning of these cases strongly support the conclusion that arbitration is not the only method of dispute resolution envisaged by s.155(1) of the *Canada Labour Code*, although, in practical terms, arbitration is often the method selected by the parties.

The fact that subsection (2) of Section 155 provides for arbitration if the parties have failed to negotiate a provision for the final settlement of differences as required by s.155(1), does not lead to the conclusion that arbitration is mandatory. Subsection (2) only operates if the parties have not provided a settlement mechanism as required by s.155(1). It does mean, however, that if there is no agreement as to settlement mechanism, or no effective method is selected, arbitration becomes the method by default. [See: *CKCH Radio Ltee* v. *CLRB*, [1976] 1 F.C. 3 (F.C.)].

Such a conclusion, i.e. that arbitration alone is not mandated by s.155(1), is consistent with the decision of the recent Supreme Court of Canada decision in *St. Anne Nackawic Pulp & Paper Co. Ltd.*, [1986] 1 SCR 704. Arbitration under the Code may be the preferred method, and if selected by the parties to the exclusion of other methods in the collective agreement, will be the only method of resolution. However it is open for the parties in their agreement to choose other, or alternative, methods of resolution.

In the present case the wording of the agreement does provide for an alternative approach in that it specifically keeps

alive the employee's right to an action before the Courts because it provides:

> "This agreement is not intended to deny the right of the employees to use any lawful action (emphasis added) for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier."

In some 20 years of experience, I have never seen such a clause in a Canadian collective agreement. However, the fact that the clause is to that extent unique does not mean that it would not be valid under s.155(1) of the Code. To my knowledge, such a provision has never been considered by the Courts in Canada in the context of s.155(1) of the Code, or any other labour legislation for that matter. Thus I conclude that the words "or otherwise" as used in the section, permit Court action as well as arbitration.

The second question, as to whether employees could bring such an action as the present one before a Canadian Court, may be somewhat more debatable but in my view such an action could be brought given the wording of the agreement referred to in the previous paragraph. Clearly, if the action is not to enforce a provision of the collective agreement, such an action may be brought. [See: *Hamilton Street Railway Co.* v. *Northcott* (1966), 58 DLR(2d) 708]. To the extent that the action is founded in quasi contract or unjust enrichment, the action should be permissible. However, even if the action flows from an alleged breach of the agreement, given the wording of the clause which permits recourse by employees to lawful action within certain time limits, my view is that the action could be brought.

There have been instances where the Courts have entertained actions based on the master-servant contract even where a collective agreement is in force (*See: Grottoli v. Locke & Son Ltd* [1963] 2 O.R.254; *Wilkinson v. Goldberg et al* 39 CPC 180 (Ont. Prov. Ct.)). However, it is true that this line of cases is open to question in *McGavin Toastmaster Ltd.* v. *Ainscough* [1976] 1 SCR 718. However it is interesting to note that even in the latter case, which seriously questioned whether any remnant of a master-servant relationship survives a collective bargaining situation, the employees were successful in obtaining severance pay by Court action.

None of the cases, before or after the *McGavin Toastmaster* decision contained a clause in the collective agreement permitting "lawful action" as in the instant case. Thus none of the Canadian cases are directly on point.

In my view the clause in the agreement can be interpreted in three ways. First, it specifically preserves the master-servant relationship for the purposes of court action. If this interpretation is correct, the rationale behind the *McGavin Toastmaster* reasoning disappears. Second, it could be interpreted as bestowing upon the employee the right to enforce by action claims arising from the agreement. In the absence of any statutory prohibition, such as *The Rights of Labour Act* R.S.O. 1980, c.456 s.3(3) which precludes enforcement of the collective agreement by the Court in Ontario, there is no reason why this interpretation could not be accepted. *The Rights of Labour Act* which is a provincial statute does not apply to agreements falling under federal jurisdiction such as the present case and there is no equivalent statutory bar imposed by federal legislation. Thirdly, it could be interpreted as merely preserving rights of action that would exist apart from the collective agreement. Given the wording of the clause and the context in which it is found, I find this interpretation the least likely, but

even if it is adopted, the employees' claims based on quasi contract or unjust enrichment would not be precluded.

The same analysis could be applied to the other form of collective agreement clause which establishes a one-year time limit for claims before "a tribunal having jurisdiction pursuant to law or agreement."

Finally, there is no question that the applicable Canadian legislation, if any, is the *Canada Labour Code* and not the *Ontario Labour Relations Act*. The operation in question is a "federal work, undertaking, or business" within the meaning of Section 2(b) of the *Canada Labour Code*, and thus falls under federal, as opposed to provincial jurisdiction.

Sworn before me at the
City of London, on the Province
of Ontario, November nd, 1988

_____

A Notary Public in and for
the Province of Ontario

AGREEMENT

between

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(PERE MARQUETTE DISTRICT)

and

ALL THAT CLASS OF EMPLOYEES
HEREIN SPECIFIED REPRESENTED BY

BROTHERHOOD OF RAILWAY CARMEN
OF THE UNITED STATES AND CANADA

Revised and Reprinted July 1, 1985

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RULE 3

(d) HOLIDAY PAY

(Article II, August 21, 1954 NATIONAL AGREEMENT as revised to January 1, 1983)

Section 1. Subject to the qualifying requirements contained in Section 3 hereof, and to the conditions hereinafter provided, each hourly- and daily-rated employee shall receive eight hours' pay at the pro-rata hourly rate for each of the following enumerated holidays:

EMPLOYEES IN THE UNITED STATES

New Year's Day	Thanksgiving Day
Washington's Birthday	Day After Thanksgiving
Good Friday	Christmas Eve Day
Memorial Day	Christmas Day
Fourth of July	New Year's Eve Day
Labor Day	

EMPLOYEES IN CANADA

New Year's Day	Thanksgiving Day
Good Friday	Friday After Thanksgiving
Victoria Day	Christmas Eve Day
Dominion Day	Christmas Day
Civic Holiday	New Year's Eve Day
Labour Day	

(a) Holiday pay for regularly-assigned employees shall be at the pro-rata rate of the position to which assigned.

(b) For other than regularly assigned employees, if the holiday falls on a day on which he would otherwise be assigned

to work, he shall, if consistent with the requirements of the service, be given the day off and receive eight hours' pay at the pro-rata rate of the position which he otherwise would have worked. If the holiday falls on a day other than a day on which he otherwise would have worked, he shall receive eight hours' pay at the pro-rata hourly rate of the position on which compensation last accrued to him prior to the holiday.

(c) Subject to the applicable qualifying requirements in Section 3 hereof, other than regularly assigned employees shall be eligible for the paid holidays or pay in lieu thereof provided for in paragraph (b) above, provided (1) compensation for service paid him by the Carrier is credited to 11 or more of the 30 calendar days immediately preceding the holiday and (2) he has had a seniority date for at least 60 calendar days or has 60 calendar days of continuous active service preceding the holiday beginning with the first day of compensated service provided employment was not terminated prior to the holiday by resignation for cause, retirement, death, non-compliance with a union shop agreement, or disapproval of application for employment.

Section 2. Eliminated.

Section 3. A regularly-assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the Carrier is credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. If the holiday falls on the last day of a regularly assigned employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday.

Except as provided in the following paragraph, all others for whom holiday pay is provided in Section 1 hereof shall qualify for such holiday pay if on the day preceding and the day following the holiday they satisfy one or the other of the following conditions:

RULE 32 - GRIEVANCES AND CLAIMS
(Revised January 1, 1955)

(1) All claims or grievances shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowances. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood,

however, that the parties may, by agreement, at any stage of the the (sic) handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly-authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

(2) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such,

continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filling thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(3) This Rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.

(4) This Rule is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

(5) All conferences between local officials and local committees to be held during regular working hours without loss of time to committeemen.

RULE 33 - STRIKES AND LOCK-OUTS

Should the highest designated railroad official, or his duly authorized representative, and the aggrieved employee, or his representative, as provided in first paragraph of Rule 32, fail to agree, the case shall then be handled in accordance with the Railroad Labor Act.

Prior to assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employees.

RULE 70

Date Effective.

This is a revision and reprint to the Agreement effective May 1, 1954, which was last reprinted May 1, 1954.

This Agreement shall become effective July 1, 1985, unless otherwise indicated, and shall continue in effect unless and until changed in the manner prescribed by the Railway Labor Act, as amended.

FOR: THE EMPLOYEES:	FOR: THE CHESAPEAKE AND OHIO RAILWAY COMPANY (former PERE MARQUETTE DISTRICT):
_____	_____

APPENDIX A

AGREEMENT

* * * * *

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(CHESAPEAKE AND PERE MARQUETTE DISTRICTS)

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEN ISLAND RAILROAD CORPORATION

WESTERN MARYLAND RAILWAY COMPANY

and employees represented by the

BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA

* * * * * * *

EFFECTIVE: June 1, 1979

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ARTICLE VI - RATES OF PAY

Section 1. Rate Schedule

The following schedule of basic rates is to be applied beginning with the effective date of this agreement:

1st Period	$ 6.25
2nd Period	$ 6.79
3rd Period	$ 6.93
4th Period	$ 7.17
5th Period	$ 7.44
6th Period	$ 7.72

NOTE: The above are basic rates in effect January 1, 1979 not including cost-of-living adjustments.

ARTICLE VIII - GENERAL PROVISIONS

No provision of this Agreement shall be construed as requiring any of the Carriers to establish any given number of apprentice positions in any craft.

This document constitutes a separate agreement by and on behalf of the signatory Organization and each Carrier.

Signed at Baltimore, Maryland this 18th day of April, 1979

Signatures not reproduced.

APPENDIX D

VACATION AGREEMENT

ARTICLES OF AGREEMENT

Article I. (Revised Effective January 1, 1982)

(a) Effective with the calendar year 1973, an annual vacation of five (5) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred twenty (120) days during the preceding calendar year.

(b) Effective with the calendar year 1973, an annual vacation of ten (10) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has two (2) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred ten (110) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of two (2) of such years. not necessarily consecutive.

(c) Effective with the calendar year 1982, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred (100)

days during the preceding calendar year and who has eight (8) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of eight (8) of such years, not necessarily consecutive.

(d) Effective with the calendar year 1982, an annual vacation of twenty (20) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred (100) days during the preceding calendar year and who has seventeen (17) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of seventeen (17) of such years, not necessarily consecutive.

(e) Effective with the calendar year 1973, an annual vacation of twenty-five (25) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred (100) days during the preceding calendar year and who has twenty-five (25) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of twenty-five (25) of such years, not necessarily consecutive.

(f) Paragraphs (a), (b), (c), (d) and (e) hereof shall be construed to grant to weekly and monthly rated employees,

whose rates contemplate more than five days of service each week, vacations of one, two, three, four or five work weeks.

(g) Service rendered under agreements between a carrier and one or more of the Non-Operating Organizations parties to the General Agreement of August 21, 1954, or to the General Agreement of August 19, 1960, shall be counted in computing days of compensated service and years of continuous service for vacation qualifying purposes under this Agreement.

(h) Calendar days in each current qualifying year on which an employee renders no service because of his own sickness or because of his own injury shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes on the basis of a maximum of ten (10) such days for an employee with less than three (3) years of service; a maximum of twenty (20) such days for an employee with three (3) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employee with fifteen (15) or more years of service with the employing carrier.

(i) In instances where employees who have become members of the Armed Forces of the United States return to the service of the employing carrier in accordance with the Military Selective Service Act of 1967, as amended, the time spent by such employees in the Armed Forces subsequent to their employment by the employing carrier will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier.

(j) In instances where an employee who has become a member of the Armed Forces of the United States returns to the service of the employing carrier in accordance with the

Military Selective Service Act of 1967, as amended, and in the calendar year preceding his return to railroad service had rendered no compensated service or had rendered compensated service on fewer days than are required to qualify for a vacation in the calendar year of his return to railroad service, but could qualify for a vacation in the year of this return to railroad service if he had combined for qualifying purposes days on which he was in railroad service in such preceding calendar year with days in such year on which he was in the Armed Forces, he will be granted, in the calendar year of his return to railroad service, a vacation of such length as he could so qualify for under paragraphs (a), (b), (c), (d) or (e) and (i) hereof.

(k) In instances where an employee who has become a member of the Armed Forces of the United States returns to the service of the employing carrier in accordance with the Military Selective Service Act of 1967, as amended, and in the calendar year of his return to railroad service renders compensated service on fewer days than are required to qualify for a vacation in the following calendar year, but could qualify for a vacation in such following calendar year if he had combined for qualifying purposes days on which he was in railroad service in the year of his return with days in such year on which he was in the Armed Forces, he will be granted, in such following calendar year, a vacation of such length as he could so qualify for under paragraphs (a), (b), (c), (d) or (e) and (i) hereof.

(l) An employee who is laid off and has no seniority date and no rights to accumulate seniority, who renders compensated service on not less than one hundred twenty (120) days in a calendar year and who returns to service in the following year for the same carrier will be granted the vacation in the year of his return. In the event such an employee does not return to service in the following year for the same carrier

he will be compensated in lieu of the vacation he has qualified for provided he files written request therefor to his employing officer, a copy of such request to be furnished to his local or general chairman.

Article 2. (Revised effective January 1, 1976)

• An employee's vacation period will not be extended by reason of any of the eight recognized holidays (New Year's Day, Washington's Birthday, Good Friday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas) or any holiday which by local agreement has been substituted therefor, falling within his vacation period.

Article 2 is further amended, effective January 1, 1973, to change the reference to "eight recognized holidays" to "nine recognized holidays" and add Veterans Day to the holidays named.

Article 2 is further amended, effective January 1, 1976, to change the reference to "nine recognized holidays" to "ten recognized holidays" and add Christmas Eve (the day before Christmas is observed) to the holidays named.

Article 3.

The terms of this Agreement shall not be construed to deprive any employee of such additional vacation days as he may be entitled to receive under any existing rule, understanding or custom, which additional vacation days shall be accorded under and in accordance with the terms of such existing rule, understanding or custom.

Article 4.

(a) Vacation may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employees in seniority order when fixing the dates for their vacations.

The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates.

(b) The Management may upon reasonable notice (of thirty (30) days or more, if possible, but in no event less than fifteen (15) days) require all or any number of employees in any plant, operation, or facility, who are entitled to vacations to take vacations at the same time.

The local committee of each organization affected signatory hereto and the proper representative of the Carrier will cooperate in the assignment of remaining forces.

Article 5.

Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the designated date, at least thirty (30) days' notice will be given affected employee.

If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided.

Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay.

Article 6.

The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employees remaining on the job, or burden the employee after his return from vacation, the carrier shall not be required to provide such relief worker.

Article 7.

Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

(b) An employee paid a daily rate to cover all services rendered, including overtime, shall have no deduction made from his established daily rate on account of vacation allowances made pursuant to this Agreement.

(c) An employee paid a weekly or monthly rate shall have no deductions made from his compensation on account of vacation allowances made pursuant to this Agreement.

(d) An employee working on a piece-work or tonnage basis will be paid on the basis of the average earnings per day for the last two semi-monthly periods preceding the vacation, during which two periods such employee worked on as many as sixteen (16) different days.

(e) An employee not covered by Sections (a), (b), (c), or (d) of this article will be paid on the basis of the average daily straight time compensation earned in the last pay period preceding the vacation during which he performed service.

Article 8.

The vacation provided for in this Agreement shall be considered to have been earned when the employee has qualified under Article 1 hereof. If an employee's employment status is terminated for any reason whatsoever, including but not limited to retirement, resignation, discharge, non-compliance with a union-shop agreement, or failure to return after furlough he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service including pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employee has qualified therefor under Article 1. If an employee thus entitled to vacation or vacation pay shall die the vacation pay earned and not received shall be paid to such beneficiary as may have been designated, or in the absence of such designation, the surviving spouse or children or his estate, in that order of preference.

Article 9.

Vacations shall not be accumulated or carried over from one vacation year to another.

Article 10.

(a) An employee designated to fill an assignment of another employee on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly

assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid.

(b) Where work of vacationing employees is distributed among two or more employees, such employees will be paid their own respective rates. However, not more than the equivalent of twenty-five percent of the work load of a given vacationing employee can be distributed among fellow employees without the hiring of a relief worker unless a larger distribution of the workload is agreed to by the proper local union committee or official.

(c) No employee shall be paid less than his own normal compensation for the hours of his own assignment because of vacations to other employees.

Article 11.

While the intention of this agreement is that the vacation period will be continuous, the vacation may, at the request of an employee, be given in installments if the management consents thereto.

Article 12.

(a) Except as otherwise provided in this Agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the

regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.

(b) As employees exercising their vacation privileges will be compensated under this Agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute "vacancies" in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority.

(c) A person other than a regularly assigned relief employee temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. If a person so hired under the terms hereof acquires seniority rights, such rights will date from the day of original entry into service unless otherwise provided in existing agreements.

Article 13.

The parties hereto having in mind conditions which exist or may arise on individual carriers in making provisions for vacations with pay agree that the duly authorized representatives of the employees, who are parties to one agreement, and the proper officer of the carrier may make changes in the working rules or enter into additional written understandings to implement the purposes of this Agreement, provided that such changes or understandings shall not be inconsistent with this Agreement.

Article 14.

Any dispute or controversy arising out of the interpretation or application of any of the provisions of this Agreement shall be referred for decision to a committee, the carrier members of which shall be the Carriers' Conference Committees signatory hereto, or their successors; and the employee members of which shall be the Chief Executives of the Fourteen Organizations, or their representatives, or their successors. Interpretations or applications agreed upon by the carrier members and employee members of such committee shall be final and binding upon the parties to such dispute or controversy.

This article is not intended by the parties as a waiver of any of their rights provided in the Railway Labor Act as amended, in the event committee provided in this article fails to dispose of any dispute or controversy.

Article 15.

Except as otherwise provided herein this Agreement shall be effective as of January 1, 1973, and shall be incorporated in existing agreements as a supplement thereto and shall be in full force and effect for a period of one (1) year from January 1, 1973, and continue in effect thereafter, subject to not less than seven (7) months' notice in writing (which notice may be served in 1973 or in any subsequent year) by any carrier or organization party hereto, of desire to change this Agreement as of the end of the year in which the notice is served. Such notice shall specify the changes desired and the recipient of such notice shall then have a period of thirty (30) days from the date of the receipt of such notice within which to serve notice specifying changes which it or they desire to make. Thereupon such proposals of the respective parties shall thereafter be negotiated and progressed concurrently to a conclusion.

Form 1

Award No. 24000
Docket No. 43636
90-1-89-1-C-4435

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (Dave Allen, et al.
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Has the Carrier violated the collective bargaining agreement by refusing to pay its Canadian employees the wage rates set forth in such agreement either in United States currency or the equivalent value of such United States currency, and thereby refusing to pay its Canadian employees the same wages as it pays its U.S. employees performing identical work?"

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute and filed a Submission with the Division.

This Board has jurisdiction to hear this case. We recently heard, and decided a case involving the Brotherhood of Locomotive Engineers and CSX Transportation Inc. on the issue of pay for Canadian employees. We also heard and decided a case involving the United Transportation Union and CSX on the same issue of pay for Canadian employees. In both cases the parties conceded that this Board had jurisdiction. Over the years disputes involving Canadian District Crews of the Chesapeake and Ohio Railway Company were handled before Public Law Boards in the United States. Please see Award 25, of PLB 884, and Award 5 of PLB 884. See also, for example, First Division Award 20399 on the matter of jurisdiction.

We have considered the case presented to the Board on behalf of the Claimants. In First Division Award 23963 involving the UTU and the Carrier, we recently found that the Carrier did not violate the collective bargaining agreement and past practices in the manner in which it paid its Canadian employees. In the instant case the Claimants assert that the contract is unambiguous and that it is reasonable to

interpret the symbol "$" to mean U.S. dollars. In First division Award 23963 a majority of this Board stated:

> "The record does not support the Organization's contention that the Agreement clearly and unequivocally sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. A strong case can be made for the Organization's position as to meaning, but it is not clear and unequivocal in support of the Organization's interpretation. The rates of pay in the Agreement Rules are stated in dollars ($). Canada's currency is dollars and so is the U.S. currency. The Carrier reads the contract as requiring it to pay employees who work and reside in Canada in Canadian dollars. Such is also a possible reading of the contract. We find therefore that the contract language used by the parties does not clearly and unequivocally support the Organization's position that the Agreement sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. Rather, we find that the contract language is ambiguous.
>
> What is as clear as a bell, however, is that for the period of 25 to 30 years according to the actual memory of individuals in a position to know, and

> for an indefinite period prior thereto, the Carrier has made payment to its employees working and residing in Canada in Canadian dollars, without an adjustment for the exchange rate differences between the U.S. and Canada. We find that this long-standing, open, and unchallenged practice, which was applied to every conductor, trainman, and engineer for at least the past thirty years is controlling in determining the parties intent where the Agreement is ambiguous, as has been determined in this case. We find that the Carrier has not violated the Agreement and past practices by paying its employees in Canadian dollars unadjusted for the exchange rate between the U.S. and Canada. We must therefore answer the question before this Board in the negative."

We find no basis in the case presented by the Claimants to alter the position taken by the Board majority in Award 23963. We are compelled to deny the Claim. We point out again, as we did in Award 23963, that a new rule must be negotiated in order to change the application of the current Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Attest:_____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1990.

Form 1

Award No. 23963
Docket No. 43610
89-1-89-1-C-4433

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (CSX Transportation, Inc.
(
(United Transportation Union

STATEMENT OF CLAIM:

"Has the Carrier violated the collective bargaining agreement and the past practices by paying its employees in Canada with Canadian dollars unadjusted for the exchange rate between the U.S. and Canada?"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

Form 1

Award No. 23963
Docket No. 43610
89-1-89-1-C-4433

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization contends that the applicable Agreement Rules clearly and unequivocally set wages in terms of U.S. dollars for all members of the collective bargaining group. It contends that there is no exception to these Rules allowing the Carrier to reduce scheduled wages paid to Canadians. The Organization contends, moreover, that if a binding practice existed, it was dissolved because (a) practice does not supersede a clear, controlling and specific rule; and (b) where a rule is clear and unambiguous, either party may insist on its rights under the rule by serving notice upon the other that a practice is discontinued. The Organization contends that in paying Canadian Division engineers the U.S. dollar amounts called for in the schedule in Canadian dollars unadjusted for the exchange rate, CSX writes itself a discount in wages equal to the exchange rate; and the Agreement, absent a provision so providing, cannot possibly be read in such a tortured fashion.

Form 1

Award No. 23963
Docket No. 43610
89-1-89-1-C-4433

The Carrier contends that it has paid Canadian employees who reside and work in Canada the rates of pay set forth in the Agreement in Canadian dollars unadjusted for the exchange rate between the United States and Canada for many years. The Carrier contends that past practice is controlling in seeking the intentions of the parties where the provisions of the Agreement are ambiguous.

The record does not support the Organization's contention that the Agreement clearly and unequivocally sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. A strong case can be made for the Organization's position as to meaning, but it is not clear and unequivocal in support of the Organization's interpretation. The rates of pay in the Agreement Rules are stated in dollars ($). Canada's currency is dollars and so is the U.S. currency. The Carrier reads the contract as requiring it to pay employees who work and reside in Canada in Canadian dollars. such is also a possible reading of the contract. We find therefore that the contract language used by the parties does not clearly and unequivocally support the Organization's position that the Agreement sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. Rather, we find that the contract language is ambiguous.

What is as clear as a bell, however, is that for the period of 25 to 30 years according to the actual memory of individuals in a position to know, and for an indefinite period prior thereto, the Carrier has made payment to its employees

working and residing in Canada in Canadian dollars, without an adjustment for the exchange rate differences between the U.S. and Canada. We find that this longstanding, open, and unchallenged practice, which was applied to every conductor, trainman, and engineer for at least the past thirty years is controlling in determining the parties intent where the Agreement is ambiguous, as has been determined in this case. We find that the Carrier has not violated the Agreement and past practices by paying its employees in Canadian dollars unadjusted for the exchange rate between the U.S. and Canada. We must therefore answer the question before this Board in the negative.

The Carrier states in its Submission that the remedy for the Organization to pursue is to negotiate a new rule if it desires to change the application of the current Agreement. The Carrier is correct in this regard. While the United States Supreme Court has recognized, regarding negotiating new agreements, that the procedures of the Railway labor Act are purposely long and drawn out (UTU v. Long Island Rail Road Co., 102 S.Ct. 1349 (1982)), negotiating a single new rule certainly does not have to involve such a process. The Organization in effect sees a form of discrimination in the Carrier's method of paying Canadian employees, asserting that such employees are receiving far less actual pay than their American counterparts for performing the same service. Exchange rates are a function of many economic factors which can properly be pursued and studied in negotiations along with evidence showing the actual purchasing

power of Canadian dollars in Canada versus the purchasing power of American dollars in the U.S. and all other relevant factors. In negotiations, then, the parties may fully study the problem. The Carrier has absolutely no interest in discriminating against its employees on the basis of race, color, creed, sex, national origin, age or handicap not just because the law prohibits such, but also because it is simply not ethical or "right." Indeed the Carrier expends significant resources to accomplish what is "right" in the before mentioned areas. In the instant matter, the Organization in negotiations has to prove the problem to the Carrier, and based on all factors, it is reasonable to expect that the Carrier will do what is "right."

Form 1

Award No. 23963
Docket No. 43610
89-1-89-1-C-4433

A W A R D

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Attest:_____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1989.

Form 1

Award No. 23964
Docket No. 43612
89-1-89-1-C-4434

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (CSX Transportation, Inc.
(
(Brotherhood of Locomotive Engineers

STATEMENT OF CLAIM:

"Has the Carrier violated the collective bargaining agreement and the past practices by paying its employees in Canada with Canadian dollars unadjusted for the exchange rate between the U.S. and Canada?"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

Form 1

Award No. 23964
Docket No. 43612
89-1-89-1-C-4434

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization contends that the applicable Agreement Rules clearly and unequivocally set wages in terms of U.S. dollars for all members of the collective bargaining group. It contends that there is no exception to these Rules allowing the Carrier to reduce schedule wages paid to Canadians. The Organization contends, moreover, that if a binding practice existed, it was dissolved because (a) practice does not supersede a clear, controlling and specific rule; and (b) where a rule is clear and unambiguous, either party may insist on its rights under the rule by serving notice upon the other that a practice is discontinued. The Organization contends that in paying Canadian Division engineers the U.S. dollar amounts called for in the schedule in Canadian dollars unadjusted for the exchange rate, CSX writes itself a discount in wages equal to the exchange rate; and the Agreement, absent a provision so providing, cannot possibly be read in such a tortured fashion.

The Carrier contends that it has paid Canadian employees who reside and work in Canada the rates of pay set

forth in the Agreement in Canadian dollars unadjusted for the exchange rate between the United States and Canada for many years. The Carrier contends that past practice is controlling in seeking the intentions of the parties where the provisions of the Agreement are ambiguous.

The record does not support the Organization's contention that the Agreement clearly and unequivocally sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. A strong case can be made for the Organization's position as to meaning, but it is not clear and unequivocal in support of the Organization's interpretation. The rates of pay in the Agreement Rules are stated in dollars ($). Canada's currency is dollars and so is the U.S. currency. The Carrier reads the contract as requiring it to pay employees who work and reside in Canada in Canadian dollars. Such is also a possible reading of the contract. We find therefore that the contract language used by the parties does not clearly and unequivocally support the Organization's position that the Agreement sets the wages of Canadian employees who reside and work in Canada in terms of U.S. dollars. Rather, we find that the contract language is ambiguous.

What is as clear as a bell, however, is that for the period of 25 to 30 years according to the actual memory of individuals in a position to know, and for an indefinite period prior thereto, the Carrier has made payment to its employees working and residing in Canada in Canadian dollars, without an adjustment for the exchange rate differences between the U.S. and Canada. We find that this longstanding, open, and

unchallenged practice, which was applied to every engineer, conductor and trainman, for at least the past thirty years is controlling in determining the parties intent where the Agreement is ambiguous, as has been determined in this case. We find that the Carrier has not violated the Agreement and past practices by paying its employees in Canadian dollars unadjusted for the exchange rate between the U.S. and Canada. We must therefore answer the question before this Board in the negative.

The Carrier states in its Submission that the remedy for the Organization to pursue is to negotiate a new rule if it desires to change the application of the current Agreement. The Carrier is correct in this regard. While the United States Supreme Court has recognized, regarding negotiating new agreements, that the procedures of the Railway Labor Act are purposely long and drawn out (UTU v. Long Island Rail Road Co., 102 S.Ct. 1349 (1982)), negotiating a single new rule certainly does not have to involve such a process. The Organization in effect sees a form of discrimination in the Carrier's method of paying Canadian employees, asserting that such employees are receiving far less actual pay than their American counterparts for performing the same service. Exchange rates are a function of many economic factors which can properly be pursued and studied in negotiations along with evidence showing the actual purchasing power of Canadian dollars in Canada versus the purchasing power of American dollars in the U.S. and all other relevant factors. In negotiations, then, the parties may fully study the problem. The Carrier has absolutely no interest in

discriminating against its employees on the basis of race, color, creed, sex, national origin, age or handicap not just because the law prohibits such, but also because it is simply not ethical or "right." Indeed the Carrier expends significant resources to accomplish what is "right" in the before mentioned areas. In the instant matter, the Organization in negotiations has to prove the problem to the Carrier, and based on all factors, it is reasonable to expect that the Carrier will do what is "right."

Docket No. 43612
89-1-89-1-C-4434

A W A R D

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Attest:_____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1989.

Form 1

Award No. 23962
Docket No. 43596
89-1-88-1-C-4417

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (CSX Transportation, Inc.
(
(United Transportation Union

STATEMENT OF CLAIM:

"Is a dispute over whether the Carrier is required to pay its employees in Canada with Canadian or American dollars required to be arbitrated under the terms of the Collective Bargaining Agreement?"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and

employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The parties have agreed that the question before the Board in this case is now moot. The matter is therefore dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Attest:_____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1989.

Form 1

Award No. 23959
Docket No. 43593
89-1-88-1-C-4416

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (CSX Transportation, Inc.
(
(Brotherhood of Locomotive Engineers

STATEMENT OF CLAIM:

"Is a dispute over whether the Carrier is required to pay its employees in Canada with Canadian or American dollars required to be arbitrated under the terms of the Collective Bargaining Agreement?"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The parties have agreed that the question before the Board in this case is now moot. The matter is therefore dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Attest:_____
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1989.